



Work and COVID-19

It has been just about eight weeks since WHO characterised COVID-19 as a pandemic and about six weeks since many UK businesses were closed or staff required to work from home. Businesses are adapting and innovating where they can and some things may never be the same again, but all this pales when the tragic loss of lives is considered.

We hope that you, your families, employees and contacts are staying safe and well at this difficult time.

We have been following and updating the information on our website regularly to take account of the government announcements and changes to the details of the Coronavirus Job Retention Scheme (CVJRS) and we are relieved that the system seems to be working well and that April salaries have been delivered.

As a number of announcements have been made at the start of this week (w/c 11 May 2020), this briefing is intended to look to the future and answer some of the questions our employment group are regularly being asked as businesses wonder how a return to normality may begin to take shape.

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1. Current Plan

On Monday 11 May 2020 the government published its 50 page “roadmap” for how and when the UK will adjust its response to the COVID-19 crisis. You can read the full report [here](#).

The document reviews the current position and sets out a cautious plan for easing the current restrictions, highlighting that the overriding objective remains saving lives. The plan highlights that it will be adjusted as necessary and if easing the restrictions risks further increases in the infection rate or mortality, further measures will be implemented to increase the restrictions again.

An important part of the first step in the roadmap is starting to encourage certain workers to return to work where it is safe to do so.

The default position remains that people should continue to work from home where possible. However, the plan recognises that in some industries this is more difficult and workers can start to return to work.

This specifically covers businesses involved in:

- a) Food production;
- b) Construction;
- c) Manufacturing
- d) Logistics;
- e) Distribution, and
- f) Scientific research.

Hospitality and non-essential retail are to remain closed for now.

The following day, Tuesday 12 May, further details were announced to confirm the extension of the Furlough scheme in its current form until the end of July 2020. It was also made clear that support will be provided until the end of October 2020, with further details to be announced by the end of May 2020.

COVID-19 Secure Guidelines

Where businesses are to resume operations and get employees back to work they will need to follow the new [COVID-19 secure guidelines](#), issued on Monday 11 May.



This guidance is supplemented by eight additional guides covering particular workplaces:

- i) Construction and other outdoor work
- ii) Factories, plants and warehouses
- iii) Homes
- iv) Laboratories and research facilities.
- v) Offices and contact centres
- vi) Restaurants offering takeaway or delivery
- vii) Shops
- viii) Vehicles

You can see these [here](#).

For all businesses, there are a number of overriding principles to adhere to:

- 1. Allow staff to continue to work from home where possible.** Where this is not possible, action the next steps to facilitate a return to work, provided it is a business that is able to open.
- 2. Carry out a COVID-19 risk assessment.** Employers should consult with their workers and/or trade unions to reach agreement on working practices, following the new COVID-19 recommendations and reflecting existing employment legislation. Where possible, employers should place the risk assessments on their website and it is expected that all businesses with over 50 employees will do this.
- 3. Maintain 2 metres social distancing, wherever possible.** Employers should assess and re-design workspaces to ensure that a two metre distance can be maintained between people. This could be by staggering working hours, creating one way systems, opening more entrances and exits, or changing seating layouts.

If it is not possible for employees to be two metres apart, then to manage the transmission risk employers will need to look into adding barriers to shared spaces, facing employees away from each other, switching to shift working patterns or alternating teams to minimise contact.

- 4. Reinforcing cleaning processes.** Workplaces will need to be cleaned much more frequently, with particular emphasis on high-contact points, such as door handles and keyboards. Employers should provide handwashing facilities or hand sanitisers at entry and exit points.

It is expected that a downloadable notice will be provided that employers will be able to display to show their employees, customers and other visitors to their workplace, that they have followed this guidance.

2. Ending Furlough

We have guidance notes [here](#) about the current rules of the CVJRS and placing employees on furlough leave and it has been confirmed that the scheme will run in its current form until the end of July 2020. The Chancellor also confirmed that the scheme will remain open until the end of October 2020, but that there will be increased flexibility to enable employers to bring furloughed employees back part-time and for employers to share the costs, so that the current 80% salaries (or £2,500 cap) can be maintained for employees. Further details will be provided by the end of May 2020.

The scheme currently allows businesses that have been severely affected by COVID-19 to stop providing their employees with work and to claim up to 80% of their salary through the CVJRS to a maximum of £2,500 and approximately 7.5 million jobs have been furloughed to date. You can check eligibility to claim [here](#).

As soon as we have further details about the changes to this scheme, we will provide a further summary.

a) How do you bring furloughed employees back to work?

The first stage will be to carry out a full risk assessment of the threat that COVID-19 will continue to pose to the operation of your specific business and to implement the COVID-19 Secure guidelines. Further details about this are set out in our health and safety section.

If the employees have been given written furlough agreements, then the decision to end the furlough period would need to be actioned following those terms.

In the absence of details, then the employer needs to simply give notice to the employee that the furlough period will end and that they are required to return to work and specify the relevant date. This should be on reasonable notice, but ultimately should be a return to the previous employment terms.

Keep in mind that the furlough period currently needs to be at least 21 days to be able to make a claim through the CVJRS.

The employer will also need to consider whether there are any reasonable adjustments that may need to be made for vulnerable employees and will need to reasonably consider any requests for employees to continue to work from home.

If the employer has less work available or needs to reduce salaries, then this will also need to be considered and actioned – see the section on varying employment contracts.



b) What happens to the employee's pay when they return to work?

As returning to work should be a return to normal working arrangements, the position should be that the employee will receive their normal salary. This will be the expectation even where salary has been reduced during the Furlough period. Therefore, if the employer is unable to maintain previous salaries, then agreement to vary the employment contract should be sought. See the section on varying employment contracts.

c) What happens if we have less work for the employees to do?

This depends on the severity of the reduction in work required. If there is a significant reduction and redundancies will be necessary, then the employer will need to inform the employees of the risk of redundancy and have a consultation process. See the redundancy section.

If the employer envisages that the reduction will be temporary while the business recovers, and therefore they want to reduce the number of hours worked and the amount of pay, then they will need to reach an agreement with the employee. See the section on varying employment contracts.

The Chancellor has also announced that between August – October 2020 it will be possible to continue to use the Furlough scheme to help cover salaries, but employees will also be able to return to work part-time and still receive 80% (or the £2,500 cap) of their salaries, with the costs being split between the scheme and the employer. Further details about how this will operate will be provided by the end of May 2020.

d) What if there are outstanding disciplinary or capability issues?

Given the swift and immediate decisions made regarding the permitted operation of business, it is not surprising that many businesses may have unfinished internal procedures to resume when more normal working arrangements return. However, employers will need to take care to review the issues outstanding and consider the appropriate and most reasonable course of action. These are some points to think about:

- i) **Disciplinary procedures:** Depending on the severity of the misconduct involved, this process may have continued remotely during the period of furlough. If not, then the usual principles of acting reasonably and without unnecessary delay will apply.

The employer will need to review the allegations, the investigation undertaken and consider whether a formal hearing is still required. If it is, then this should be arranged quickly and the employee should receive all information in advance and the requirements of the ACAS code of practice and the employer's own disciplinary procedures should be followed.

Remember that social distancing will still be required for any meetings and therefore virtual alternatives may remain preferable.



- ii) Grievance procedures:** if the employee raised a grievance before the lockdown commenced, then this may need addressing before they are able to return to work, depending again on the issues raised.

It may also have had to be addressed during the furlough period, but where issues remain, these should be reviewed and further investigation carried out where necessary. The employee should then have the opportunity to air their concerns at a formal hearing as usual and the employer's own procedures and the ACAS code should be followed.

- iii) Capability procedures:** if the employee's performance had been a cause for concern before the lockdown and a performance improvement plan entered into, then this should be reviewed and updated with reasonable targets reflecting any changes to the employer's business. If the matter was still being investigated, then this should continue, and again, it will be very important to be reasonable in the decision making and follow internal procedures and ACAS guidance.

Keep in mind that for all procedures the employee will retain the right to appeal against the decision and be accompanied by a companion (either a colleague or Trade Union Representative) at the final stages. It may be possible for a furloughed colleague to be the companion and ACAS guidance suggests that furloughed employees could also chair or take notes, however, this could be inconsistent with the Treasury Directive and we would therefore recommend that any involvement of a Furloughed employee is limited to that of a supporting companion.



3. Health & Safety

All businesses are responsible for safeguarding the health and safety of anyone affected by its activities, whether they are employees, contractors, or visitors to its premises. The specific risks to health and safety vary greatly between sectors and individual businesses, but currently we are all united in fighting the spread of COVID-19.

Whatever the nature of your business, it vital to put procedures in place to avoid health and safety risks and now to implement the new COVID-19 Secure guidelines.

There are specific guides for the different workplaces and you can access them [here](#) and HSE also has updated guidance [here](#).

The new COVID-19 Secure guidelines are in addition to the existing health and safety responsibilities, which can be summarised as follows:

1. All businesses must carry out a health and safety risk assessment, including a fire-risk assessment, to identify potential risks in your business, and taking steps to remove or minimise them.
2. The person responsible for health and safety needs to be competent and fully trained.
3. Employees should be trained to cope with accidents and you should provide adequate and appropriate personal protective equipment as well as first-aid kits.
4. Maintain an accident book and a reporting system for serious injuries, diseases and incidents.
5. Businesses are required by law to have employers' liability insurance. You should also check whether you need public liability or any other insurances.

Home Working

Given that there is no change to the requirement to work from home where possible, it is important to highlight that businesses retain the same health and safety responsibilities for home workers as they do for those in the work place.

Typically, the employees who are working from home, will be office workers using equipment such as PCs, laptops, telephones and display screen equipment (DSE). For those of you with home workers using such equipment, it will be important to regularly remind them to do the following:

- a) break up long spells of DSE work with rest breaks (at least 5 minutes every hour) or a change in activity
- b) avoid awkward, static postures by regularly changing position
- c) get up and move around, or do some stretching exercises
- d) avoid eye fatigue by changing focus or blinking regularly.



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Businesses should also be aware of the effects of home working on employees' mental wellbeing as being separated from colleagues who may offer support and friendship could have a detrimental effect. Businesses should therefore have plans in place for regular contact and be able to recognise signs of stress in their employees as early as possible.

We have dedicated [Health and Safety lawyers](#) who would be pleased to answer any further questions.

4. Sickness absence

Employees have a well-established right to statutory sick pay after the first four days of absence, which is paid at a fixed rate, currently £95.85 per week. Many employees may also have the benefit of enhanced company sick pay under their employment contract. These will still need to be considered in cases of sickness absence.

While COVID-19 remains a serious threat, employers will still need to take extreme care to ensure that their staff follow the self-isolating guidance if they suffer symptoms of coronavirus to reduce risks in the workplace.

There have also been a number of specific amendments to the rules surrounding sickness absence relating to COVID-19. The most notable is the ability of employees to claim SSP from the first day of absence and to claim SSP in the following circumstances:

- i) Employees who have been advised to shield as a result of an underlying medical condition.
- ii) Employees who need to self-isolate to prevent infection with coronavirus and are therefore unable to work. This includes;
 - Those with mild symptoms staying at home for seven days;
 - Those who live with someone who has symptoms and is staying at home for 14 days;
 - Those defined in [public health guidance](#) as extremely vulnerable and at very high risk from coronavirus because of an underlying health condition, who has been notified that they must shield for the period specified in the notification.

Employers will need to ensure that they are aware of these changes and identify those in their workforce at increased risk.

Employers also need to be aware that the rules about supplying a fit note have also been varied and an [isolation note](#) may suffice instead.

Employers also need to be aware of the issues surrounding potential disability discrimination issues and duties to make reasonable adjustments and therefore specific legal advice should be sought where necessary.

5. Changing the terms of employment

When employees do start returning to the workplace, it is likely that the volume of work may take some time to recover or other changes may be required. It is also possible that there will be a need to change terms or reduce salaries where it has not been necessary to use furlough leave to help preserve the business.

Reducing salary in either case is likely to be unpopular, and particularly if employees have been receiving full pay or 80% pay on furlough leave, however, given the poor economic predictions it is possible that the employees will be understanding. Having the right team in place will also help significantly with this.

There are a number of issues to be aware of in making the decision to change the employment terms though, which are highlighted below:

a) How can the employees' hours and pay be changed when they return to work?

There are three main ways to achieve changes:

i) Mutual agreement. The safest way to have a clear understanding of new contractual terms is to reach them through consultation with the employees.

They should be notified of the changes proposed and the reasons why, with the opportunity to raise any concerns or issues about the changes. If they are prepared to accept them, then this should be evidenced in writing with full details of the changes agreed. On a practical level, employees are much more likely to agree to the changes if they understand that they are a temporary measure or will be regularly reviewed.

If the employees do not agree, then it is open to the employer to serve notice on the existing contract and offer immediate employment on the new terms when the notice expires. This runs the risk of an unfair dismissal claim, but the reason for the dismissal is likely to be regarded as "Some Other Substantial Reason" and provided a fair process has been followed, this claim may be defeated.

Be careful that if there are more than 20 employees affected and may be dismissed, longer consultation periods may apply and you should seek specific advice. Also see the redundancy section below.



- ii) **Unilateral imposition.** It is also an option to simply impose the change, but this comes with a number of risks. Firstly, failure to pay the salary due is a fundamental breach of contract that would entitle the employee to resign and claim constructive unfair dismissal as well as bring claims for unlawful deduction of salary. Therefore, this method is best left for more amicable changes, such as pay rises or holiday entitlement increases.
- iii) **In accordance with the terms of the contract.** Some contracts may reserve the right for the employer to make certain changes, however, it is risky to rely on such times and therefore prior consultation with a view to reaching agreement would be recommended in any event.

6. Redundancy/lay off

Unfortunately once the ability to claim payments under the CVJRS and the lockdown has ended there may be very difficult decisions to make to keep businesses operational. This means that it may be necessary for businesses to close specific offices, close entirely or reduce the number of employees. Where these decisions result in the dismissal of employees, redundancy will be a fair reason for that decision, but specific procedures should still be followed to avoid unfair dismissal claims. Specific advice is recommended, but we have highlighted some key points below:

a) Dismissing fairly for redundancy

Where a redundancy situation is identified, the requirements are slightly different depending on the numbers of employees affected, in particular, longer consultation periods are required (up to 45 days) and notification may need to be made to the Secretary of State, as well as electing representatives and specific guidance can be provided if required. In summary the stages involved include:

- i) Informing the employees of the risk of redundancy and the reasons why.
- ii) Identifying the employees that have been provisionally selected for redundancy. This decision should be reached by applying fair and objective selection criteria.
- iii) Consulting with the employees.
- iv) Looking at all alternatives to redundancies. This could involve reducing pay or hours under the changes to the contract section above.
- v) Holding further consultation meetings.
- vi) Making the final decision and informing the employee in person. The employee has a right to be accompanied at this meeting and a right to appeal against the decision.

b) Lay-offs

It has previously been common to have specific clauses in employment contracts entitling employers to reduce hours or lay off employees or it may be possible to agree with the employees to be laid off or work much shorter hours for a short period. However, once the employees have been laid off or kept on short-time working for at least four or more consecutive weeks; or a total of six weeks in any period of 13 weeks they are able to claim a statutory redundancy payment.

In addition, if the period goes beyond a reasonable length, the employee could also resign and bring a constructive unfair dismissal claim on the basis that this is a breach of their contract.



7. Maternity & childcare

The current situation is impacting individuals in all kinds of different ways and employers will need to be sensitive to this. This section deals with some of the common questions raised with us about maternity and childcare issues:

a) **Can we furlough employees on Statutory Maternity Leave or other parental leave?**

While technically this is possible, generally it will not be appropriate as the CVJRS cannot be used to reclaim statutory leave payments as there are already options in place to assist with these.

It may, however, be of benefit if the employee is entitled to enhanced maternity leave payments and we would suggest specific advice is sought.

b) **Can employees on maternity leave be considered for redundancy?**

Yes potentially, but be careful as specific rules and protections apply, including priority consideration for vacancies.

c) **Can a furloughed employee switch to maternity leave?**

Yes and generally this will be on a date previously agreed. Take care to ensure that the calculation of maternity pay takes account of the amended rules to take account of pre-furloughed pay if the employee's pay has been reduced while on furlough.

d) **What happens if an employee cannot return to work because they do not have childcare?**

The initial CVJRS was updated to clarify that those workers who are unable to work as a result of a lack of childcare options due to COVID-19 could be furloughed, so while the scheme is operating Furlough leave is possible.

When the scheme comes to an end, if there are still childcare difficulties parents have rights to take emergency time off to care for "dependants" and also the right to take up to 18 weeks unpaid parental leave per child under the age of 18. The employee would need to make a request to the employer that should be reasonably considered and there are various additional protections. Therefore, we would recommend seeking advice if any concerns in this regard.

e) **Other rights**

Other rights and protections under the various family friendly rules will still continue to apply as normal, such as the right to request flexible working.

8. Whistleblowing

Employers should be cautious and take steps to address and agree working arrangements during the gradual lifting of the current restrictions. They will need to be aware that specific objections could give rise to additional protection for employees in the right circumstances where that objection amounts to a “protected disclosure” under the whistleblowing legislation.

a) What is a “protected disclosure”

To provide whistleblowing protection the information must:

- i) Be information specifically disclosed explaining the nature of the concern;
- ii) The employee raising the concern must reasonably believe that it is in the public interest to do so;
- iii) And the information must fall into one of the specified categories, either that there is a breach of legal obligations, threat to health and safety or attempt to cover up either;
- iv) The information must be disclosed to a specific recipient, such as the employer or regulatory organisation.

b) Can concerns about COVID-19 be protected?

Potentially yes, depending on the full circumstances and specific advice should be sought.

c) What are the protections?

Any dismissal of an employee for raising a whistleblowing concern would be automatically unfair and they are protected from other detriments.



9. Directors

Company directors have a number of specific fiduciary duties that have not been altered by any of the emergency legislation or guidance. The key obligations are set out in the Companies Act 2006 and include acting within the Director's powers, acting with reasonable care and skill, exercising independent judgement, avoiding conflicts of interest and promoting the success of the business as a whole. Many directors will also be employees and will therefore have additional obligations in their contract of employment.

Directors will need to keep these fiduciary duties in mind when making decisions that may have to be made at great speed because of the evolving nature of this current crisis. Even then, directors making decisions will also need to have regard to:

- a) The impact on the interests of the employees;
- b) The long-term consequences;
- c) The impact on the community and the environment
- d) The maintenance of business relationships with suppliers, customers and others;
- e) Their reputation for high standards of business conduct;
- f) The need to act fairly and consistently between the shareholders.

These factors are in addition to the specific allocation of power in the Company's own articles of association and decision making processes involving their shareholders.

When directors are reviewing the current guidance and taking steps to create a COVID-19 Secure workplace, this will have to be done to take account of their employees' health and safety interests and ensuring the legal requirements are met. Employers with over 250 employees will have to provide a statement summarising how their employees' interests have been considered.

Potential disputes

Directors will be aware that they can face litigation based on claims that they have breached their fiduciary or statutory duties. It will therefore be important to keep a record of the information that was available at the time the decisions were made, including the relevant government guidance that was in place.

The changes that were proposed to the insolvency legislation, such as a suspension of the wrongful trading rules for a short period, have not yet been implemented. There remain questions around these issues and if there are specific concerns in this regard or about director and company issues we would recommend you seek advice from our [Corporate Commercial team](#).



10. Data Protection

It is important to remain vigilant about data protection, confidentiality and cyber security issues at these unsettling times, especially as many businesses have moved from relatively safe and secure offices to operate from multiple employees' homes where the business has little control. Consider the following:

- i) **Appoint suitable personnel to be responsible for compliance matters.** If you do not already have a data protection manager, an IT manager or an HR manager, consider whether it would be good to have someone taking the lead on these areas. Smaller companies can combine this role into a general compliance manager position.
- ii) **Ensure that employees think about how they treat and process personal data.** It is vital to ensure that all sensitive information is kept secure regardless of whether it is on a personal or work device. [The National Cyber Security Centre](#) recommends companies consider encryption and the possibility of remotely wiping devices to keep information secure.
- iii) **Data breaches are not just digital.** Employers should ensure that employees continue to take into account confidentiality obligations and take measures to protect personal data both at, and in transit to, the employee's home. If possible, encouraging paperless working will avoid physical documents containing confidential information being taken home and, if paperless isn't possible, remind people not to leave paperwork at home in an unsecured environment. Employers may wish to consider keeping a record of all physical documents removed from and returned to the office.
- iv) **Employers have to consider carefully how they are handling their own employees data,** especially within the context of monitoring their work. Even home IP addresses can be personal data and it can be difficult to monitor employees on a truly anonymised basis. Caution must be exercised if sharing information on employees who are exhibiting symptoms, as health data is a special category of data and subject to a necessity test. The ICO states that, while you can keep staff informed of cases within the organisation, you cannot name the sick employee while doing so.
- v) **The current crisis businesses are facing is proving to be prime ground for cyber criminals.** The National Fraud Intelligence Bureau has recorded a 400% increase in reported cases of fraud related to the Coronavirus, and employees at home might be especially vulnerable to cyberattacks and phishing scams. Employers should identify where systems and processes may be vulnerable to cyber-attacks and new threats of fraud. Remind your employees to stay alert and look out for emails/communications which are not what they appear to be.



If you would like advice on how to implement effective procedures that mitigate data protection, confidentiality, and cyber security issues, or if you have any other issues which we can help with, please contact our [Corporate Commercial team](#).

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Who do I contact for support and advice?

For more information on how we can support you during this time please contact a member of our Employment team.



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