myerson

Employment Newsletter Autumn 2020

In this edition of our employment newsletter, we answer some of the pressing questions that employers are pondering as the Coronavirus Job Retention Scheme is replaced by the Job Support Scheme.

Our newsletter covers:

www.myerson.co.uk
0161 941 4000

Government Financial Support Schemes

Coronavirus Job Retention Scheme (CJRS)

The latest figures show that the Government has supported 9.6 million workers on furlough through the CJRS. In the midst of reports that the pandemic is responsible for the loss of more than half a million jobs, the scheme has likely saved many thousands if not millions of jobs. However, it is an expensive scheme, costing approximately £35.4 billion. The scheme closed to new entrants on the 30th June and will close altogether on the 31st October 2020. Employers and employees alike are naturally concerned about what coming months will bring.

Job Retention Bonus Scheme

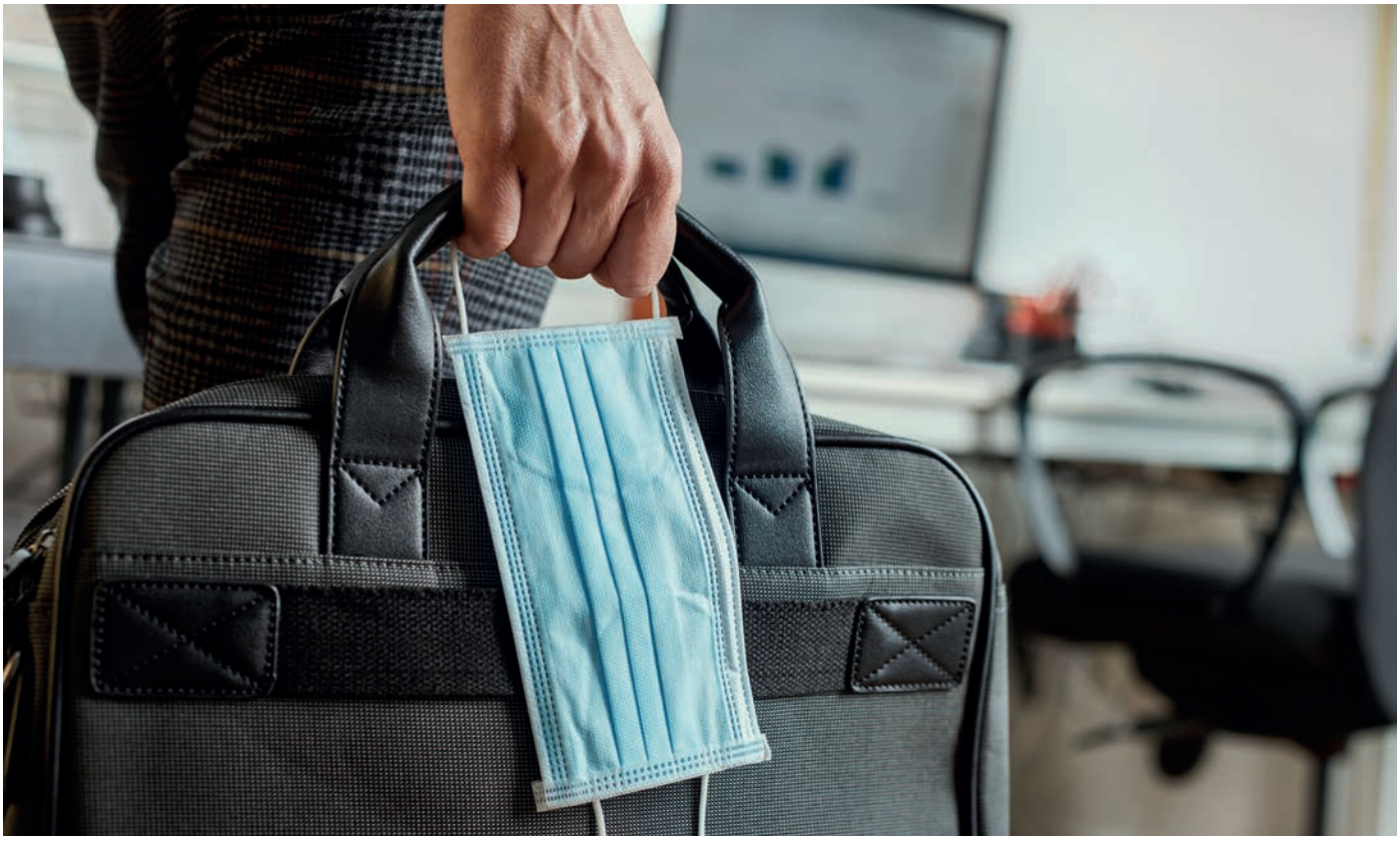
It is hoped that many employers will be incentivised to retain employees until at least January 2021 by the Government's Job Retention Bonus Scheme. Those employers who have placed employees on furlough but who retain those same employees in employment until 31st January 2021, will be able to claim a flat rate payment of £1,000 per retained employee. Further details of the scheme can be found here.

Job Support Scheme

Amid concerns about the future of the economy as the pandemic continues to present challenges to business, and perhaps in response to lobbying, the Government announced on the 24th September that a new job support scheme would replace the CJRS. The scheme will run from 1st November 2020 to 30th April 2021 with the purpose being to safeguard viable jobs over the coming months where businesses continue to suffer decreases in demand due to the pandemic. The basics of the scheme are that:

- the employer will pay an employee for hours worked; and
- for unworked hours, the employer and Government will each pay one third of the employee's salary for those hours (with the employee forfeiting the remaining third). An employer is not expected (or perhaps not permitted) to top up pay to 100%.

For full details of the scheme see our article on our website.



Bringing furlough to an end

Employers with employees returning to work from furlough, whether employees are transitioning from the CJRS to the JSS or not, will need to carefully consider and implement next steps in advance of CJRS closing on 31st October 2020.

How do we end an employee's furlough?

How a period of furlough leave should be terminated will, in part, be decided by the furlough agreement agreed between the employer and the employee. Notice to end furlough leave should ideally be given in writing and the furlough agreement may have prescribed a certain amount of notice from the employer, such as one week, or it may have set a specific expiry date for the furlough leave. If no notice period was agreed, an employer should try to give reasonable notice depending on the circumstances of both the employer and the employee.

What information should we give to employees when they return to work?

As well as setting the return date for the employee, communications from the employer should outline:

- the safety measures that have been put in place at their place of work (or which are planned);
- any temporary changes to terms and conditions which the employer must impose due to Government restrictions, e.g. new hours of work and rest periods to stagger arrival and finish times and prevent clustering in the office and/or on public transport;
- any proposed temporary or permanent changes to terms and conditions that the employer wishes to implement to reflect the circumstances of the business during the pandemic (see 'How should employers change terms and conditions of employment?');

- any changes to policies or practices spurred by the pandemic, such as sickness procedures or holiday booking rules and procedures;
- existing policies and obligations that the employer may wish to highlight, such as the employee's and employer's health and safety obligations;
- new ways of working that need to be imposed to comply with relevant Government regulations, which may include social distancing requirements, use of PPE and sanitisation measures, and minimising work-related travel and social contact;
- how benefits or bonus arrangements postponed during furlough will be handled (see 'Must deferred bonuses now be paid?');
- details of any well-being support available to employees.

Importantly, employers looking to transfer employees on to the new Job Support Scheme will in addition need to:

- agree new working arrangements and working hours under the scheme and notify these in writing, keeping them subject to review;
- agree new pay arrangements under the scheme and document the agreement in writing (as the new scheme envisages a reduction in pay).

It is a requirement of the Job Support Scheme that the new arrangements are notified in writing to the employee, and that the document is available to HMRC on request. It is important to avoid disputes or claims in relation to pay and that the pay arrangements under the scheme are clearly agreed.

What if an employee refuses to return to work from furlough?

When a furloughed employee refuses to return to work, they are arguably not ready, willing and able to work, and, in line with the implied obligations that underpin employment contracts, the employer may not be required to pay the employee. Furthermore, the employer may legitimately consider disciplinary action for an unauthorised absence.

However, an employer should be careful to understand the reason for the employee's reluctance to return. There could be a legitimate health reason or personal circumstance making a return difficult, or the employee might have concerns about personal safety or the employer's Covid-19 prevention measures. Employers should proceed with caution in such situations, to avoid claims of discrimination and unfair dismissal, including constructive dismissal.

Employers must be live to the risk of disability discrimination claims where those employees who have protected status have the right not to suffer unfavourable treatment and the right to have reasonable adjustments made to working arrangements to ensure that they are not disadvantaged.

Further, certain dismissals related to the raising of health and safety concerns can amount to automatically unfair dismissals, for which there is no qualifying service requirement and compensation is uncapped. Unfavourable treatment short of dismissal, including disciplinary action, could result in a claim of unlawful detriment.

How can we deal with outstanding accrued holidays for returning employees?

Employers may be concerned that furloughed employees have an excessive backlog of untaken holiday which, if taken after they have returned to work, will leave a worrying resource gap for the business. Employers may also be worried about furloughed employees using up holidays to delay their return date, interfering with plans to return to everyday productivity.

Employers have the right to require employees to take holidays during certain periods, by providing advance notice that is at least twice the length of the period that the worker is being required to take (i.e. a requirement to take one week of holiday would demand notice of two weeks).

An employer may also refuse a holiday request by serving a counter-notice, which must be given at least as many calendar days before the date on which the leave is due to start as the number of days which the employer is refusing.

Employees prevented from taking a holiday for reasons connected with the pandemic (either through furlough or otherwise) should be made aware of their right under new rules to carry over their annual leave from the current leave year to the next two years, if, it was not "reasonably practicable" to take the leave "as a result of the effects of Coronavirus…". More information on this point is available here.

Must deferred bonuses now be paid?

Understandably, some employers will have either cancelled bonuses outright or perhaps deferred payment due to economic uncertainty. Employees returning from furlough will be keen to understand the position in relation to their bonuses.

Paying bonuses may remain an intolerable financial risk for struggling employers. To further defer the payment of bonuses or cancel them outright, employers need to consider the nature of the bonus. That is, whether the employee enjoys a firm contractual entitlement to the bonus or whether the bonus, or part of the bonus, is subject to the employer's discretion. Employers should revisit contracts of employment and bonus schemes as well as what commitments were given and changes made at the outset of the furlough period.

If the employee has a clear contractual entitlement to the bonus (that has not been lawfully varied), an employer needs to proceed carefully in deferring, cancelling or altering the bonus, as to do so without the employee's agreement could result in a breach of contract, unlawful deduction from pay or constructive dismissal claim.

Where the terms of a bonus grant an employer the discretion to avoid paying a bonus altogether, or vary targets, reward or payment dates, there may be scope for the employer to further withhold payment. However, employers with reserved discretions must have regard to their implied duty not to act irrationally or arbitrarily in exercising their discretion, again to avoid claims in relation to any non-payment.

A COVID-safe workplace

Another new challenge for businesses will be the requirement to maintain a safe working environment for employees. The challenge varies significantly depending on the industry sector but also other factors such as the location and limitations of an employer's workplace and facilities, and the sophistication of its IT and other resources. The fundamentals of ensuring that a workplace is as safe as possible for employees, and others, are:

- encouraging workers to work from home where possible;
- carrying out a 'risk assessment' to identify risk points and taking reasonable steps to mitigate them.

The Government released non-binding 'Covid-19 Secure Guidelines' to help employers re-open workplaces in a safe and compliant manner for many industry sectors. The guides are intended to help employers undertake appropriate Covid-19 risk assessments. Employers should ensure that they follow the detailed Government guidelines for their particular sector on working safely during Coronavirus on gov.uk. The 'Covid-19 Secure Guidelines' referred to apply in England only, unless otherwise stated. There is different workplace guidance for Wales, Scotland and Northern Ireland.

Employers' obligations under health and safety legislation to ensure the health, safety and welfare at work of all employees are onerous. Additionally, employers are under a duty to provide information to and consult with employees on matters concerning health and safety at work. In advance of any return to work, employers should communicate to all staff:

- when employees are expected to be able to return to the workplace;
- how employees might be required to commute to work;
- how employee safety is being reviewed and managed (and employers could consider sharing the results of their latest Covid-19 risk assessment or any Covid-19 policy now in place);
- any workplace or other adjustments, proposed or implemented, such as new hand washing facilities, break and mealtime procedures, restrictions on the use of space or facilities or other safety protocols as well as any altered working hours or similar arrangements.

If any measures might change the terms of an employee's contract, the employer should consult with the employee and try to obtain their consent to the change, or otherwise risk a breach of contract.

It is not enough for employers to treat risk assessment and the implementation of safety measures as a one-off or tick box exercise. Employers must be continually vigilant, review practices and enforce compliance with the new measures, using disciplinary sanctions where necessary.

Concerns raised by employees in relation to measures taken, or lack of measures taken, should be taken seriously, properly considered and responded to. Employees should not be discouraged from raising concerns, and those who raise them should not suffer any disadvantage or unfavourable treatment as a result. Such employees are protected by whistleblowing legislation from unfair dismissal and detriment.

Finally, it is worth noting the legal requirement for certain businesses in England, such as hospitality and leisure businesses and close contact businesses including hairdressers, to collect staff and customer data for the purposes of the test and trace system (with a similar obligation in place in Wales). The full Government guidance can be seen here.

Right-sizing and re-organising: redundancies and changing terms

With the tapering of the CJRS, ending on the 31st October 2020, and the new Job Support Scheme supporting only those jobs that can be described as viable, many employers are having to make decisions to 'right-size' the workforce. Other employers have learned during lockdown that certain elements of their business are inefficient or underutilised and consider that future-proofing their business in the context of an uncertain future economy is now necessary.

Before implementing any plans to make redundancies or alter terms and conditions of employment, employers must carefully consider their approach and follow a fair and reasonable process in order to avoid legal claims from their employees.

How should employers go about making redundancies?

The new Job Support Scheme may provide an alternative to redundancy, but there must be a genuinely viable role which can be performed at least at 33% of capacity over coming months. Employers cannot claim under the scheme for employees under notice of redundancy.

However, where there is no viable alternative, employers may be forced to consider redundancies if their businesses are to survive. If there is a redundancy situation, the employer will need to consider the numbers affected to determine whether collective redundancy consultation rules apply. It will also need to take a careful approach to individual selection and consultation so that redundancy dismissals are fair.

When do the collective redundancy consultation rules apply?

If an employer plans to make 20 or more employees redundant at one establishment within a period of 90 days or less, it must consult on its proposal with the appropriate representatives of the affected employees and it must notify the Government's Department for Business, Energy and Industrial Strategy (using the new updated HR1 Form)

Consultation must begin in good time:

- where the employer is proposing to dismiss 100 or more employees in a 90-day period, consultation must begin at least 45 days before the first dismissal takes effect; and
- where the employer is proposing to dismiss between 20 and 99 employees in a 90-day period, consultation must begin at least 30 days before the first dismissal takes effect.

What process do employers need to follow in an individual redundancy situation?

Where fewer than 20 employees are affected by a redundancy exercise, there is no prescribed statutory process for carrying out a redundancy consultation process. However, in all cases, whether the collective consultation rules apply or not, the employer is required to act reasonably in all of the circumstances in relation to each individual dismissal.

Where an employee has fewer than two years' service, as they would not have the requisite service to bring an unfair dismissal claim, an employer has a much-reduced risk, provided the decision to dismiss is not discriminatory or otherwise unlawful.

However, employees with more than two years', will be entitled to a statutory redundancy payment and their dismissal will normally be unfair unless the employer:

- consults with employees individually about the proposed redundancies;
- uses a fair basis to select individuals for redundancy, selecting them from an appropriate pool of employees using objective selection criteria, reasonably applied;
- carefully and genuinely considers suitable alternative employment by searching for and, if available, offering any suitable vacancies within the company and any group companies.

For further information on collective consultation, see our guide to redundancies and restructuring. See also our recent article on the new Guidance published by ACAS in relation to managing redundancies.

How should employers change the terms and conditions of employment?

Employers may wish to alter employees' terms and conditions of employment for various reasons, such as by reducing hours and pay, altering shift patterns or places of work, introducing greater flexibility around start and finish times or inserting lay-off clauses into a contract in anticipation of further lockdowns.

To identify the correct approach to achieving change, an employer should first check whether existing contracts provide the flexibility to allow the employer's proposed change. Variation clauses in contracts can be effective depending on the particular wording of the clause relied on, the reason for and the extent of the change. An employer's authority to enforce change is always qualified by the implied term of trust and confidence, ensuring that reasons for change are legitimate and that employees are consulted and given notice.

If the change cannot be accommodated within the existing contractual wording, an employer will need to:

- obtain the employee's agreement to the new terms (either from the individual employee or through a binding collective agreement);
- unilaterally impose the change and rely on the employee's continued employment as implied agreement (although employers should be cautious and seek advice first in taking this approach);
- terminate the existing employment contract and offer re-employment on the new terms. This approach is one of last resort as such terminations amount to dismissals and accordingly potential claims for unfair dismissal may arise.

In the case of the last option, where an employer is proposing to terminate the contracts of 20 or more employees and offer to re-engage them on new terms, the employer will need to comply with the same collective consultation obligations as applicable in cases of multiple redundancies.

Homeworking

Since the lockdown, many employees have been working from home. Some may have previously spent some of their working time at home under pre-existing arrangements, whilst other employers have introduced remote working for the first time. A change in workplace to the home on a full-time or part-time basis may require a formal change to certain terms of the contract of employment. Issues to consider also include:

- steps to guard confidential information and personal data;
- insurance provision including in relation to employer equipment;
- the health and safety implications of the remote working location, including appropriate risk assessment and whether additional equipment should be provided;
- how homeworkers will be managed and supervised and how their well-being will be provided for;
- implications in relation to costs, expenses and tax.

Flexible working

Aside from homeworking, there are many flexible working arrangements to be considered to assist an employer in managing its workforce safely during continued pandemic restrictions. Such measures could include a change to the employee's total working hours or the days and times during which they work.

Flexible working arrangements might also involve part-time working, compressed hours, flexi-time, job-sharing, shift-working, staggered hours and term-time working. Where an employer wishes to implement such arrangements, this may again require a formal change to terms and conditions of employment and a careful process should be followed to achieve agreement or other lawful variation.

How can we help you?

The pandemic and associated economic challenges have presented employers with unprecedented dilemmas and hurdles to overcome. Decisions to be made, now and over coming months, may be difficult and urgent. In addition to having considered and sound commercial reasons for decisions affecting employees, employers must be confident that such decisions are made and implemented having regard to employment law. A failure to have such regard may result in unwelcome claims causing yet further cost, demand on resources and potential reputational damage. If you need support in these difficult times, you can contact our employment law team who will be able to guide you through unfamiliar and complicated decisions.

Join us for our Autumn Update so that we can bring you up to date with employment law developments over the past 6 months. We promise not to mention Covid-19, furlough or redundancy but will cover instead current Hot Topics, including:

- Top tips for avoiding unfair dismissal and latest cases
- Immigration – what are the new rules from January 2021?
- TUPE update
- Employment status – self-employed, worker or employee?
- What employee data can you use and what can you not use?
- Equal pay update
- And more…

So **book now** and join us for a live webinar on Wednesaday 18th November at 10am.

For more information on matters discussed in this newsletter or any other employment law issues please contact our specialist employment team or call 0161 941 4000.

myerson HR
Your Needs Covered

We now offer Myerson HR, a full-service HR retainer package based on a simple fixed annual fee. It gives you full control over your HR spend, whilst ensuring easy access to a team of highly experienced Employment and HR solicitors. For more information **click here.**

If you would like to know more, please contact Charlotte Gilbert on 0161 941 4000 or email **charlotte.gilbert@myerson.co.uk** for more information.