

IN DEPTH

July 2020 Newsletter

Elcons Employment Law Consultants Ltd

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Re-opening your business - are you Covid safe?

Many employers are now trying to reopen their businesses. There is no hard and fast way that you should do this, but remember that you have a legal responsibility to protect your employees and other people that may be affected by what you do.

The key is to start with a risk assessment. The Government have provided a number of useful guidance documents for different industry sectors to help you understand some of the risks and how to put relevant control measures in place. This guidance can be found via the following link: <https://www.gov.uk/coronavirus-business-reopening>

If you do not carry out a risk assessment, the Health and Safety Executive (HSE) or your local council can issue an enforcement notice.

It is really important to try and follow the Government guidance as much as possible - don't forget that there are different rules in different parts of the UK and that the guidance is changing regularly. Once you are satisfied that you have carried out a suitable risk assessment and put the required controls in place, you should talk to your employees and discuss with them the new control measures and how they will be implemented. The HSE have put together some guidance to help with working safely and communicating with your employees (<https://www.hse.gov.uk/coronavirus/working-safely/index.htm> and <https://www.hse.gov.uk/coronavirus/working-safely/talk-to-workers.htm>). You should also display a signed copy of the Covid Secure certificate. For larger employers it is also good practice to put a copy of your Covid Risk Assessment on your website.

For subscribed Health and Safety clients, we are happy to help you with your Covid Risk Assessment and locate the best guidance. For clients who are interested in our Health and Safety full services please contact yasminer@elcons.co.uk 01422 822842



**“Supporting employers with HR advice
throughout the Covid-19 pandemic”**

Forthcoming Changes

We have had so many changes in such a short space of time, all amidst a pandemic. Times are challenging so here is a recap:

Recent Changes

- National Minimum Wage Increases (1st April 2020). NMW/NLW hourly rates are:
 - Apprentices (under 19 or in first year of apprenticeship) = £4.15
 - Age 16 - 17 = £4.55
 - Age 18-20 = £6.45
 - Age 21 - 24 = £8.20
 - National Living Wage (25+) = £8.72
- Statutory Maternity Pay and other family-related statutory pay rates increases to £151.20 per week (5th April 2020).
- Good Work Plan Regulations come into force - contracts of employment are a day one right and must have additional key information either within the contract or another accessible document (6th April 2020).
- Increases in Statutory Sick Pay to £95.85 per week (6th April 2020)
- Introduction of Parental Bereavement Leave and Pay (The Parental Bereavement Leave and Pay Act 2018 gives all employed parents the right to 2 weeks' paid leave if their child aged under 18 dies, or if they have a stillbirth at 24 weeks or later). **Take advice where necessary.**
- Information and Consultation change (6th April 2020). (The threshold for making a valid request to set up information and consultation arrangements under the Information and Consultation of Employees Regulations 2004 drops from 10% to the 2% of the workforce. There still needs to be 15 employees making the request).
- Increase in holiday reference period from 12 weeks to 52 weeks (6th April 2020).
- Extension of the right to a written statement to all workers (6th April 2020).
- Employment tribunal award limits increase (6th April 2020).
- Unfair dismissal award limit increases to £16,140.
- Requirement for payslips to state hours worked where pay varies (6th April 2020).
- Lower earnings limit for national insurance contributions increases from £118 to £120 (6th April 2020).

All things Covid...

- Entitlement to statutory sick pay for those who are self-isolating due to coronavirus introduced (13th March 2020).
- Coronavirus Act comes into force (25th March 2020).
- Right to carry over statutory annual leave for two years introduced (26th March 2020). (The temporary amendment to the Working Time Regulations 1998 (WTR) will allow workers to carry over up to 4 weeks of holiday for up to 2 years if issues relating to COVID-19 have meant it was "not reasonably practicable" for a worker to take some or all of their leave).
- Entitlement to statutory sick pay for those who are "shielding" introduced (16th April 2020).
- Rules on calculating normal weekly earnings for family-related benefits for those who are furloughed introduced (25th April 2020).
- Right to statutory sick pay when self-isolating due to contact with coronavirus (28th May 2020).
- Recovery of statutory sick pay for coronavirus cases introduced (26th May 2020).

NB: The Government has announced a suspension of enforcement measures on gender pay gap reporting for 2019/20 in view of the unprecedented pressures businesses are currently experiencing.

Upcoming changes (all TBC):

- Technical amendments to employment law following the UK's exit from the EU to take effect.
- Increase to the length of time required for continuity of employment to be broken.
- **New** legislation to ensure that tips and gratuities go to staff.
- **New** right for workers to request a more stable contract.
- Whistle-blowers protected when applying for jobs in children's social care sector.
- Income tax personal allowance linked to national minimum wage.
- Neonatal leave and pay - the Good Work Plan outlined to commit to extra statutory leave and pay for all parents of premature babies needing specialist care in a neonatal unit.

Covid 19 and the Impact for Employers

As dramatic measures by governments around the world are being made, slowing down the spread of the coronavirus has been the number one priority. However, this has come with big implications for world economies.

In order to control the COVID-19 pandemic the United Kingdom declared a lockdown on March 23, 2020. This seems to have helped rein in the public-health crisis, but some businesses have been very hard hit by either closures or the decrease in activity due to lock down.

Around 7.6 million jobs, (24% of the UK workforce), are at risk of job loss because of the impact of COVID-19 and its related lockdowns. Research indicates it is those on the lowest incomes who are the most vulnerable.

According to the Office of National Statistics, in the 2 weeks from 6th April 2020 to 19th April 2020, 23% of businesses had temporarily closed or paused trading, with around 60% of businesses that continued to trade reporting a fall in revenues.

As lockdown restrictions are lifted there does seem to be light at the end of the tunnel. However, the speed and patterns are highly uncertain and will vary by sector and such a rapid fall in output has significant implications for employment.

On the upside:

New Working - Employers across different sectors are beginning to appreciate the importance of flexibility and forced to put contingencies in place they have been given an opportunity to trial home working models and a variety of technologies which assists with this. Many businesses have opted to permanently give up premises/downsize on site personnel and make a change which makes business sense. Moving forward, businesses may look very different.

Trust, Empowering Employees, and Culture - Employers have had to trust their employees more and more, therefore, forcing and overcoming major cultural challenges, especially for office-based organisations. Organisations have had to adapt to the fast-paced change which has subsequently enabled individuals to respond to a rapidly changing reality. Considering the pandemic, a new more digitally capable workforce has been born. Having massive benefits, new learning, and the introduction of virtual communication platforms such as Teams, WhatsApp and Zoom have replaced time consuming meetings, learning, and training sessions.

Productivity and Efficiency - Many employers are reporting increased productivity and gains in efficiency through a reduction in interruptions and clearer communications. Employers are finding that their employees can focus more effectively on the task at hand enhancing their productivity. It may also be seen that the pandemic is a significant tipping point in the working from home trend, with the majority of companies deciding that it is more profitable for their employees to remain remotely based.

On the downside:

Costs - The costs to small businesses have been huge, not only have they lost revenue but as the lock down starts to ease the cost of putting the social distancing laws into place are putting added pressure on those already struggling.

Stress / Mental Health - With social distancing measures imposed by governments this has meant that people are now more isolated than ever before. Homes have turned into offices, gyms, playgrounds, and schools have been closed and individuals living alone are not able to socialise as much as they normally may do. Employees and employers are dealing with considerable uncertainties and change due to financial worries, health threats and potential job losses. It is therefore unsurprising that with these levels of uncertainty, worry and stress is on the increase including pre-existing mental health conditions such as anxiety, depression, and OCD.

Should you have any concerns regarding any issues concerning your business or any of your employees during this uncertain time, ELCONS provide a full Employment Law package tailored to suit every sector's needs. If this is for our clients, we don't need to pitch but should mention call your advisor for support on specific cases...

**Please call 01422 822 842
for further details.**

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Coronavirus Job Retention Scheme: Key Dates

We will be looking at the scheme in two main parts:

1. 1st March until 30th June
2. 1st July to 31st October – this is further broken down monthly as each month has an altered formula as to what can be received, and what the employer will be expected to contribute.

Announced on Friday 20th March 2020, the scheme offers support for employers whose businesses have been affected by the virus. The scheme permits employers to pose to their employees an option of Furloughing as an alternative to lay off or redundancy. In doing so, the employee may then receive pay at 80% of their normal earnings (up to a max of £2500 per month), which under the scheme, the employer will then be able to claim back via HMRC.

Which employees are covered?

The scheme covers employees or workers provided that they were on a UK employer's PAYE payroll and notified to HMRC on an RTI submission on or before 19 March 2020 (Previous versions of the guidance contained a cut-off date of 28 February 2020, but this was revised to 19 March 2020 in the update published on 15 April 2020).

July 1st until the 31st August

From the 1st July you may bring employees back off furlough and place them on whatever hours you need them for. The employer will be responsible for 100% of the employees' wages for the hours they work but you may claim back 80% of the furloughed hours via the Coronavirus Job Retention Scheme.

To implement this, you will need:

1. To confirm the working hours/patterns to your employees in writing. The minimum period you must do this for is one week although you may confirm the pattern/hours in writing for longer periods.
2. To submit data on the normal hours the employee would be expected to work in the claim period and the hours they actually work in line with the temporary written agreement.

You may continue to use the scheme in its current form for those you do not have work for or who remain unable to return to work.

July

The initial scheme formula will exist with the additional flexibility allowing employers to bring employees back part-time. Employers will be responsible for paying employees for hours worked if they come back part time as detailed above but can claim 80% of the unworked hours.

August

Both the above will still exist but instead of the scheme paying the employers National Insurance and Pension Contributions, this responsibility will pass back to employers.

September

- The CJRS will drop to 70% contribution (£2,187.50 cap) for the hours the employee does not work.
- The employer is required to pay employers National Insurance and Pension Contributions.
- The employer is required to top up 10% of the wage of non-worked hours (up to the cap of £2,500)
- and if working part-time, remains responsible for payment of 100% of pay for worked hours.

October

As above but...

- The CJRS will drop to 60% contribution (£1875 cap) for the hours the employee does not work.
- The employer is required to top up 20% of the wage of non-worked hours (up to the cap of £2,500)

Employer Allowance:

If you are a smaller employer some or all of your NICS bills are covered under Employer Allowance. Please visit the HMRC website to assess your company's eligibility.

DEADLINES and LAST ENTRANTS TO THE SCHEME

THE CJRS Scheme closes to new entrants on the 30th June. You may only claim from the scheme after this date for employees who have been furloughed for a full three-week period prior to 30th June meaning that 10th June would be the last date for any new furlough entrants to enter the scheme. There are exceptions for those returning from a long period of parental related absence e.g. shared parental leave or maternity leave.

Deadline

Employers will have until 31st July to make claims for the period to 30th June.

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Furlough and notice pay

What happens if you have had to make redundancies or your employee is dismissed due to conduct or resigns whilst they are on furlough?

Do you pay their notice and if so how much?

Do you pay them in lieu, put them on garden leave or leave them on furlough?

It is a confusing time with the Coronavirus Job Retention Scheme guidelines constantly having little tweaks and now 3 new guidance measures.

The 3rd Treasury Direction dated 25 June 2020 states:-
“2.2 Integral to the purpose of the CJRS [Coronavirus Job Retention Scheme] is that the amounts paid to an employer pursuant to a CJRS claim are used by the employer to continue the employment of employees in respect of whom the CJRS claim is made whose employment activities have been adversely affected by the coronavirus and coronavirus disease or the measures taken to prevent or limit its further transmission.”

This appears to state that you shouldn't reclaim the 80% from the Job Retention Scheme for employees who are on notice.

Therefore we would advise at this stage that if you make redundancies you probably won't be able to reclaim 80% of it from the Job Retention Scheme.

However, it hasn't been made clear if this is the same for other dismissals or resignations and you may well be able to reclaim the 80% back.

So do you need to top their notice pay up to 100%?

This depends upon their contractual notice (i.e. what is in their employment contract) – and if in doubt do ask your Advisor.

If their contractual notice is the same as statutory notice, i.e. 1 week per year up to a maximum of 12 weeks per year, then you would need to top their furlough pay up to 100% during their notice period.

However, if their contractual notice is over 1 week more than statutory notice, you can just pay them the 80%.

Examples

John has 6 year's service and his contract states 3mths notice – 3mths notice is more than 1 week higher than statutory (which would be 6 weeks) therefore he would just receive the 80% (if furloughed).

Sarah has 4 year's service and her contract states 1mth's notice – 1mth notice is not more than 1 week higher than statutory (which would be 4wks) therefore her notice would need topping up to 100% (if furloughed).

IF IN DOUBT SPEAK TO YOUR ADVISOR!

Taking holidays whilst on Furlough

Employees continue to accrue holidays during furlough, therefore if you have had employees furloughed since March 2020, you could be worrying about their return i.e. when will they be able to take their holidays / how will you be able to fit everyone's holidays in before the end of the holiday year.

Irrespective of whether you normally allow employees to carry over annual leave, due to this issue, employers are allowed to let their employees carry over up to 4 week's holiday for up to 2 years.

The guidance states:- ***The Working Time (Coronavirus) Amendment Regulations 2020 (SI 2020/365) amend regulation 13 of the Working Time Regulations 1998 (SI 1998/1833) (WTR 1998) to permit the carry-over of any untaken WTD leave where it was not reasonably practicable to take it in the leave year “as a result of the effects of the coronavirus (including on the worker, the employer or the wider economy or society)”.***

However, most companies won't want to do this if possible therefore you have options:-

1. Encourage employees who are currently furloughed to take annual leave during the furlough period
2. Enforce annual leave to be taken during furlough

Yes, you can force employees to take annual leave during furlough provided you:-

1. Top their furlough pay up to 100%
2. Give them twice as much notice to take the leave (in writing) as the leave e.g. give 2 weeks notice to take 1 week's leave. Ask your advisor for a letter.

What if an employee wants to take annual leave and you cannot allow it due to the additional cost of topping up to 100%, or if they are working, the workload?

An employer may refuse a worker's holiday request by serving a counter-notice. This 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 (regulation 15(4)(b), WTR 1998) e.g.

If the worker has requested six days' leave and the employer wishes to refuse five days of the request, it must give notice at least five calendar days before the date on which the leave was due to start

You would need to make sure that everything is put in writing and your Advisor can help with this!

Redundancy during Furlough

Redundancies are definitely 'frowned upon' during furlough as the whole point of the Job Retention Scheme is to keep employees in jobs.

However, if you genuinely cannot continue employing staff and it is not going to improve after the furlough period and for the foreseeable future, then you may need to take that step!

So what do you do!

With any redundancy situation - firstly take Advice! We will want to see:-

- A business rationale (the reason behind the proposed redundancies, why that department/those job roles etc.)
- An organisation chart of the company before and after proposed redundancies
- A list of affected employees with their details

Why do we want to see all this information you may ask? Because this is what an Employment Tribunal would consider if a claim was received and also we can advise properly on the whole procedure with the full information.

You still need to follow procedures that you normally would do if not furloughed or it could result in a successful claim.

This is generally 3 meetings over a 2 week period and may involve criteria, if there is more than one person doing a particular role.

However, the consultation period/process may be reduced if the person has under 2 years service and there are no protected characteristics like pregnancy, disability, age etc. **Or** if could be longer especially if there are proposed 20+ redundancies as it would need to be Collective Consultation then of 30 or 45 days. The process is then more complicated and defined.

What criteria should you use (and should not use)?

Criteria needs to be 'objective' and 'quantifiable' wherever possible e.g. disciplinary record, absence record, length of service, time keeping record, skills, experience and qualifications.

However, if this isn't possible and you need to use more 'subjective' criteria then make it as fair as possible by :-

1. Agreeing the criteria with the employees before scoring, during consultation
2. Ensure more than one person will do the scoring and do it separately then add together
3. Consider an interview (based on a scoring matrix with more than one interviewer)
4. Keep a record of how the scoring is done and include wherever possible, documents e.g. appraisals, discussions etc.
5. Discuss the scores with the employee once completed and consider their feedback before a decision is made

Take advice before starting any consultation to ensure a meaningful consultation is carried out to protect your company.

Lay off and short time working

Once the Coronavirus Job Retention Scheme has finished (or before if you cannot furlough your employees), you may need to consider Lay off or short time working.

The first thing you have to check is whether the right to lay off is in their contract, as if not then you cannot enforce it without their permission.

This is deemed a temporary diminishment of work so relevant only if work is likely to improve in the next few months, however preferable to making redundancies if possible.

Lay off or short time working can be total lay off (with no work given) or partial which could be less days worked and/or less hours e.g. a 3 day week.

They would receive Statutory Guarantee Pay for the first 5 x normal 24hr periods not worked, which is currently £30 per day, then nothing for the remainder of up to 3 months.

However, if you only reduced their hours e.g. 7 hr day reduced to a 5hr day, there would be no 24hr periods without pay and therefore Statutory Guarantee Pay would not be due.

You can implement this with a discussion, then letter (which your Advisor can assist you with).

However, there are always risks with this as they are not receiving their normal salary so please take advice.

Also, if you are reducing their hours/pay by over 50% they could resign and claim a redundancy payment from you, after 4 weeks constant lay off or 6 weeks in a 13 week period. If this happens it is possible to 'counter notice' it if you can guarantee work but please contact your advisor as the rules are quite complex!

Basically, this is very useful as a 'short term fix' rather than a long term resolution, therefore it should only be for short periods of time or it could risk a claim.

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Part-time working under the flexible furlough scheme

Employees may now work for their employer on a part time basis and be furloughed for the remainder of the time. However, employers and employees will still need to formally agree to work part time under the flexible furlough scheme and confirm this in writing. Employers should give reasonable notice to their employees to notify them of their return to work - please ask your advisor to draft a letter!

When returning to work from full time furlough

You should discuss workload and objectives with all employees returning to work and make necessary adjustments to take into account their current working hours. Adjustments may include reduced workload or deadlines could be extended.

Whilst working under the flexible furlough scheme

employees should not be expected undertake work during non-working time. This includes not requesting them to check emails or take phone calls during non-working time.

Wellbeing

Some part time employees find it difficult not to overwork to compensate for their reduced hours. Others find that they carry on working almost as many hours as they did when they were working full time. It is important that you provide clear instructions on your expectations that employees do not feel the need to work over their part time hours.

Employees working from home need to be encouraged to establish some clear boundaries between work and home, such as designating a place for work or putting away work tools at the end of their working hours.

First Aid Training Is Resuming

Emergency First Aid Training at Work and Mental Health Awareness Training is resuming in August 2020. Group numbers are restricted due to the precautions necessary around Covid-19 and social distancing as stipulated by Public Health England and the Government guidelines. The course content and delivery has also been adapted taking all the precautions into account and these are being delivered here at head office in our purpose built training room. The cost of the course is £125 plus VAT per delegate, and places are reserved on a first come and first served basis.

For further information please contact rachelh@elcons.co.uk for further information.



Elcons Weekly Training Courses

We are hoping to resume training at the end of August 2020, beginning of September, although we cannot have the same group sizes as previously, so keep an eye out and we will be in touch!

Internal News

Senior Consultant, Emma Baker emigrates to Crete and undertakes her new role within Elcons. We all wish Emma all the very best and will miss her presence in the office.

Refer a friend, neighbour, family member, business associate or even your Accountant's details. Businesses now need Elcons more than ever, just as our subscribed clients have found out through the Covid-19 pandemic. You can help us grow our business by giving us a company name, contact name and telephone number - we will do the rest. And for your introduction and to say a huge thank you, we will send you a cheque for £50 for doing so...

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Elcons are proud to be sponsoring our local team Halifax Rugby League this season. We are looking forward to the rugby and meeting new businesses and having a drink or two with our existing clients who are also sponsors!

Come on you Fax!

*"After you have read our latest newsletter, try some of this....
and most of all relax and enjoy your summer"*

