Hogan Lovells

Exiting lockdown and the re-opening of UK workplaces – employers' frequently asked questions

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This note addresses some of the key questions employers are asking about their obligations to employees when businesses start to re-open on a phased basis after the UK's approach to lockdown is scaled back. It will be updated as the situation develops.

The government issued guidance for employers on 11 May about working safely. You can find the guidance here. Our experience in relation to other guidance issued since the pandemic started suggests that this will be updated reasonably regularly.

We have not specifically addressed the health and safety issues employers will have to consider in this note. Colleagues in our commercial and regulatory team have written a briefing on those issues, which you can find here.

Returning to the workplace

How should we decide which employees should return to the workplace?

Government guidance indicates that employees who are able to work from home should continue doing so for the present if at all possible, to minimise the risk of transmission and to reduce the pressure on public transport services.

Employers may want to consider allowing employees who are working from home under difficult conditions, for example because they live in shared accommodation or do not have space to create a suitable working environment, to return to the workplace initially. Priority may also be given to employees who are able to travel to work without relying on public transport, for example because they can cycle or walk to work. Employers may need to extend their provision for cycle storage for example to facilitate this, or be flexible about start and finish times to reflect the fact that employees are likely to have a longer journey to work than normal.

The guidance makes the point that employers will need to consider their obligations under the Equality Act when making arrangements for a return to the workplace and ensure that these do not place certain groups sharing a protected characteristic, such as age, at a disadvantage. Employers will also owe additional obligations to employees with disabilities. For example, it

could be a reasonable adjustment to allow certain employees to return to the workplace earlier than others. Employees with some mental health conditions may find working from home more challenging than others. Conversely, it could also be a reasonable adjustment to delay an employee's return to the workplace where a mental health condition makes it difficult for them to do so, even if they would physically be able to do so safely.

What is the position in relation to employees who are shielding?

The government guidance remains unchanged that certain groups who are extremely vulnerable, such as those with severe respiratory conditions or some types of cancer, should continue to shield. Those employees obviously should not be required to attend the workplace. They are entitled to receive statutory sick pay (and potentially company sick pay depending on the rules of the scheme) if they are unable to work from home and have not been furloughed.

And for employees who live with employees who are shielding?

You may want to give special consideration to employees who are living with someone who is shielding. Although these employees do not also need to shield in accordance with public health guidance, they may be less willing to return to the workplace than other employees because of the risk to the vulnerable individual.

If such employees are not able to work from home, you will have to decide whether you are prepared to continue to pay them. Although you would not generally be obliged to do so, some employers are continuing to pay employees in that category for the time being. However, if that is not tenable in the long-term, you may want to consider offering employees a period of unpaid or possibly part-paid leave until we reach the point at which all employees feel able to return to work safely. You could also treat employees in the same way as you would someone who was shielding, for example by offering sick pay for a period.

How should we respond if an employee with no underlying health condition does not want to come to work because they are worried that this is unsafe?

If the employee is able to work from home, in most cases employers are likely to permit this to continue, particularly given that this would be consistent with government guidance.

If the employee cannot work from home, they are not entitled to demand to work from home simply as a protective measure, although discrimination issues could arise in respect of employees in vulnerable groups, perhaps because of their age. The position of vulnerable employees is dealt with below.

If the employee is concerned about the safety of the workplace, the employer may be able to reassure them by explaining the measures that the employer has put in place to protect their health and safety. These should already have been discussed with employee representatives or the employees themselves in the absence of representatives. If the employee's concern is about travel to and from work on public transport, the employer may want to consider allowing them to flex their start and finish times so they are not travelling at what have (historically at least) been peak times for commuting. Flexibility about working hours is also one way that employers can minimise the number of employees in the building and help to maintain social distancing.

Ultimately however, and leaving aside the position of vulnerable employees, if the employee is refusing to attend the workplace the employer will not generally be under an obligation to pay

them and could consider taking disciplinary action against them. Most employers are likely to want to seek a compromise with an employee in this situation, potentially including agreeing a period of unpaid leave, before proceeding with disciplinary action. It is automatically unfair to dismiss an employee or subject them to a detriment for refusing to work in circumstances where they reasonably believe that there is imminent and serious danger. It seems relatively unlikely, although not impossible, that this provision would apply where an employer had fully complied with the government's health and safety guidance.

What is the position for employees who are vulnerable but not in the category that are advised to shield?

Employees with conditions such as diabetes, chronic respiratory diseases and heart conditions are regarded as being vulnerable, although are not being advised to shield. However, such employees may well be disabled for the purposes of the Equality Act. Employees aged 70 or over are also viewed as vulnerable, as are employees who are pregnant.

The government guidance suggests that vulnerable employees who cannot work from home should be offered the safest available on-site roles that allow them to stay at least 2m away from others. If this is not possible, employers will have to consider whether they are complying with their health and safety obligations if they do ask employees who are regarded as vulnerable to return to the workplace. Allowing them to continue to work from home is likely to be a reasonable adjustment for an employee with a disability, and dismissing an employee for refusing to return to work could be unfair on ordinary principles, or automatically unfair as a health and safety related dismissal.

Employers may also face age discrimination or pregnancy and maternity related discrimination claims depending on the employee's circumstances. Employees who are pregnant may need to be suspended on full pay on health and safety grounds if it is not possible to work safely in the workplace and there is no suitable alternative work they can be offered.

What is the position for parents whose children have not yet returned to school?

Parents, particularly those with primary school aged children, may not be able to return to the workplace until schools re-open for all children. If possible, they should continue to work from home and employers are likely to continue to take a pragmatic approach to home working in these circumstances. Some employees have been able to reduce their hours temporarily, including through a flexible use of parental leave, to allow them to combine their work and childcare responsibilities.

If home-working is not possible, staff could be invited to take a period of holiday, unpaid leave (potentially including parental leave), or a period of unpaid time off to deal with an emergency situation involving a dependant. Although emergency leave is normally intended to deal with short-term absences, employers may be more flexible in terms of how leave is used at the present time. Depending on the future of the government's job retention scheme, it may also be possible to place the employee on furlough for a period or further period.

Screening for and dealing with illness

Can we ask staff to have their temperature screened when arriving at the workplace?

If employees consent to having their temperature taken when they arrive at work, this is uncontentious, although employers will also need to consider data privacy implications of the request and particularly the need to comply with rules on processing special categories of data. If a check reveals that an employee has a high temperature, they should then be required to self-isolate in accordance with current government guidance.

However, the question arises as to how to respond if an employee refuses to give consent, particularly in circumstances where the government's guidelines do not specifically recommend that employees be screened in this way. Although in principle you could take disciplinary action against an employee for refusing to take a test, on the basis that the employee is refusing to follow a reasonable management instruction, in the current situation that might appear heavy-handed. A dismissal for refusing would be unfair if a tribunal found that the employer had not acted reasonably in all the circumstances in treating the refusal as a reason to dismiss. If the employer's risk assessment has identified temperature screening as an effective way of managing health and safety risk, and there are sensible reasons for reaching this conclusion, the employer may well be able to show that it is acting reasonably.

Can we require employees to download a contact tracing app?

Similar issues arise if an employer wants to require an employee to download a contact tracing app before being allowed to return to the workplace. If the employee consents, this is obviously unproblematic (subject to any data privacy implications if the employer is itself processing data). An employee may be more likely to consent if the employer communicates the reasons for the request sensitively, potentially including consulting employees in advance, and makes it clear that the app is purely being used as a health and safety measure to protect all employees. Particularly where an employer will not be processing data, and is asking employees to use the app to minimise the risk of spreading the virus and protect other employees, it seems likely that this would be viewed as a reasonable instruction.

Can we require staff to be tested for COVID 19 before returning to work?

Asking an employee to undergo a test is more intrusive than asking them to have their temperature screened. As such, it is likely to be harder to persuade an employment tribunal that it was fair to dismiss an employee for refusing to consent to testing, particularly where this is not something that is specifically required or recommended by government guidance. It is potentially more likely to be reasonable if it has been identified that the employee has come into contact with someone who has COVID-19 through use of a contact tracing app, although at that stage employees could simply be required to self-isolate as a precaution instead of needing to have a test.

The employer would be more likely to be able to show that a dismissal was fair if it could point to compelling reasons why testing was required both in general and for the specific employee in particular. This may be difficult for the majority of jobs. Data privacy requirements would also have to be taken into account before introducing testing of this sort.

Can we require an employee not to attend the office because we suspect they may have COVID-19 and if so what are they entitled to be paid?

This will depend on the reasons for excluding an employee. If you are doing so in line with government guidance on self-isolation, it will be reasonable to require the employee not to attend the office, in order to comply with health and safety obligations to other staff. The employee will be eligible for statutory sick pay from day one and government guidance asks employers to "use their discretion and respect the medical need to self-isolate in making decisions about sick pay". Employees who are self-isolating because someone in their household has symptoms of COVID 19 are also entitled to statutory sick pay.

If an employee is being sent home in circumstances where there is no government guidance to that effect, the employee will generally be entitled to be paid in the normal way if they have a contractual right to be provided with work (as most employees will). The employer is under an implied duty to pay wages for work that the employee is willing and able to perform and which the employer's actions have prevented them from carrying out.

Managing economic difficulties during the restart phase

Can we implement a unilateral pay freeze or cut or require staff to reduce their hours?

A pay freeze should be straightforward to implement. In the private sector it is relatively unlikely, although not impossible, that employees will have a contractual right to a pay rise. To the extent that decisions on pay rises have not been taken and communicated to employees, a pay freeze can be implemented where there is no right to an increase.

However, imposing a pay cut or requiring employees to reduce their hours unilaterally will generally amount to a breach of contract. Employees could choose to resign and claim constructive dismissal, or (more likely) protest against the pay cut, keep working and bring unauthorised deduction from wages claims in the employment tribunal or a breach of contract claim in the county court. The position may be different if the contract allows the employer to reduce an employee's hours (for example in the case of a zero hours contract or the contract of an hourly paid employee which expressly grants the employer the power to vary the hours worked).

If employees are prepared to agree to a pay cut or reduced hours and pay, perhaps on the understanding that the arrangement will be temporary and revisited once the current crisis is over, it would be possible to implement a pay cut or change in hours by consent. Employees may be more willing to agree to reduced hours or a pay cut in circumstances where this might avoid more draconian measures like redundancies.

Can we require staff to take a period of unpaid leave?

At the moment, employers are more likely to want to access the government's job retention scheme as an alternative to asking staff to take unpaid leave. It remains to be seen how the scheme will adapt during the restart phase.

If the scheme is no longer available, it is important to remember that it will generally be a breach of contract to require an employee to take a period of unpaid leave, entitling the employee to resign and claim constructive dismissal, or bring an unauthorised deduction from wages claim in the employment tribunal or a breach of contract claim in the county court.

In limited circumstances where an employee's right to be paid depends on being given work by the employer, the employer may have a contractual entitlement to lay the employee off for a period without pay or to put the employee on short-time working. The employee may be entitled to a statutory guarantee payment or a statutory redundancy payment depending on the circumstances.

Employees may be willing to agree to take a period of unpaid leave, particularly if this is offered as an alternative to redundancies. In the financial crisis some employers offered an element of pay during leave as an encouragement to staff to take it. It was also relatively common to allow employees to spread the pay they lost over a period of time, such as six months, so that they did not have to suffer a complete loss of pay up front.

Do normal redundancy processes apply?

If an employer decides that it needs to make redundancies, the normal requirements for employee consultation where an employer is proposing to dismiss 20 or more employees at one establishment within a period of 90 days continue to apply. Consultation must take place for 30 days if there are between 20 and 99 redundancies and for 45 days if 100 or more redundancies are proposed.

Although there is a "special circumstances" defence where consultation or the normal periods of consultation are not reasonably practicable, now that we are in the restart phase, it seems relatively unlikely that a tribunal would regard it as being not reasonably practical to inform and consult in accordance with the usual timetable.

It is important to remember that even if there are "special circumstances", this does not necessarily mean that consultation obligations can be ignored. Employers in this situation should still take whatever steps they can to consult employees before implementing redundancies, even if consultation does not last for the full period normally required.

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