大成 DENTONS

UK People, Reward and Mobility Newsletter

JUNE 2020

IN THIS ISSUE

02
Could a right to work from home be enshrined in UK law following lockdown?

03
Neurodiversity in the workplace

05
Changing terms and conditions: a tricky issue

07
Safety first: UK employment rights of health and safety representatives

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: whether a right to work from home could become law; neurodiversity in the workplace; changing terms and conditions of employment in the post COVID-19 era; and the employment rights of health and safety representatives in the UK.

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at www.ukemploymenthub.com

Could a right to work from home be enshrined in UK law following lockdown?

The prospect of a return to the workplace in the coming weeks and months is certainly a divisive topic for employees. While there are those who cannot wait to return, many have grown accustomed to working from home, enjoying the perks of not commuting and a better work-life balance. Also, understandably, many have safety concerns. A recent CIPD report found that 44% of workers reported feeling anxious about the prospect of going back to work because of the health risks posed by COVID-19 to them and those close to them.

From an employer standpoint, although not true across the board, many businesses which have made the transition to home working have found that worker productivity has not suffered as a result, with Zoom calls, Slack and other technologies connecting employees with their colleagues and managers effectively.

Cognisant of the above positives and also aware of the savings to be made if no longer required to accommodate staff in large, centrally located offices, many companies have indicated that they will look to extend their work-from-home programmes (with one announcing that its employees can work from home "forever" if they so wish).

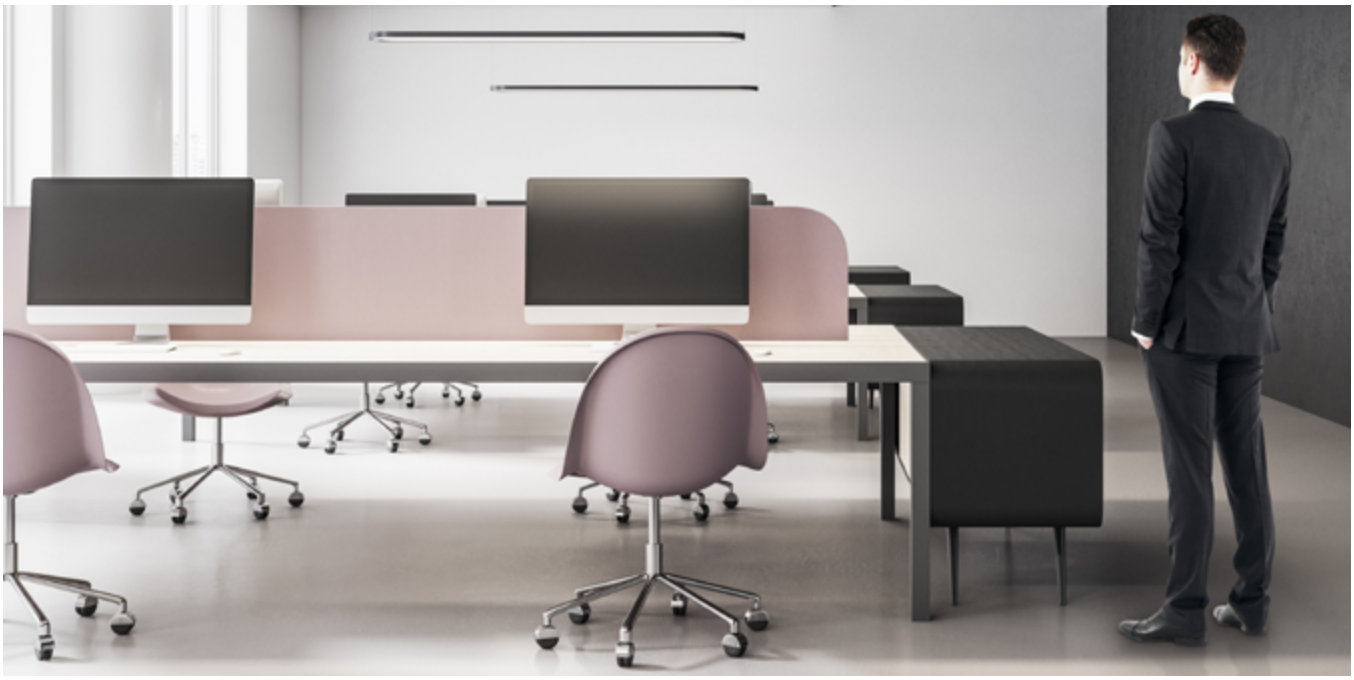
Seemingly live to the nation's mood, officials at the Business, Energy and Industrial Strategy department have mooted the possibility of enshrining a right to work from home in law as part of an array of options to help the UK transition out of lockdown. Such a move would be aligned with the Prime Minister's manifesto pledge to make flexible working the norm and the 2017 Taylor Review which said flexible working "has been shown to have a positive impact on productivity, worker retention and quality of work."

The UK would not be alone if it were to introduce such measures. Flexible working has been part of Finland's working culture for more than 20 years. The Working Hours Act, passed in 1996, gives most staff the right to adjust their typical working hours

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- The Lawyer: Five UK lawyers make partner in Dentons' promotions
- People Management: Coronavirus and whistleblowing by Michelle Lamb
- Scottish Grocer: Criminal charges and dismissal by Tariq Nabi



by starting or finishing up to three hours earlier or later. The newly introduced Working Hours Act 2020 now gives the majority of full-time employees the right to decide when and where they work for at least half of their working hours. Germany has also recently announced that it will introduce laws giving employees the right to work from home.

However, what form could such legislation take in the UK? The UK could seek to amend the Working Time Regulations 1998 in a similar way that Finland amended its old Working Hours Act. Another option would be to make existing flexible working legislation more employee-friendly by reducing the barriers to making a flexible working request (FWR) and, conversely, further limiting employers' grounds of refusal. Other changes could be to allow FWRs to be made more than once every 12 months, while the cap of eight weeks' pay on compensation for an employer's failure to respond adequately to an FWR could be raised.

As the country recovers from the economic impact of the COVID-19 pandemic, it is unlikely that any legislation in this area would provide employees with an unqualified right to work from home. There would need to be an element of flexibility for employers to allow them to meet business need. While the form of any such legislation is unclear, following the COVID-19 pandemic, it is certain that the direction of travel is towards ever greater numbers of people working from home.

Neurodiversity in the workplace

It is estimated that 15% of the UK population are neurodiverse. Many workplaces will already be accommodating neurodiverse employees but without the proper awareness and understanding of how best to support these employees.

With Learning Disability Week taking place this month we have taken the opportunity to explore neurodiversity in the workplace and what employers should be doing. As a starting point, it is worth noting that ACAS has produced some very helpful guidance for employers, managers and employees.

What is neurodiversity?

Put concisely, people think differently. Neurodiversity is the way the brain processes and interprets information. One in seven people are neurodivergent, meaning that their brain processes information differently to most. Neurodivergence is experienced along a spectrum and has a range of characteristics which vary depending on the individual. There are various forms of neurodivergence but the most common are autism, dyslexia, dyspraxia and ADHD. While there tend to be certain expectations about the effects of each of these, they all cover a wide range of differences.

Supporting neurodiverse employees in the workplace

Employers are increasingly looking at how to promote diversity and inclusion in the workplace.

That should include neurodiversity. The focus should not be on neurotypical minds alone. Neurodivergent employees can excel in the workplace, especially with the right support.

Under the Equality Act 2010, neurodivergent conditions are normally classed as a disability, providing they meet the required conditions. Employers can and should put in place active strategies, policies and measures and make reasonable adjustments to help neurodivergent employees work effectively and make them feel valued and supported.

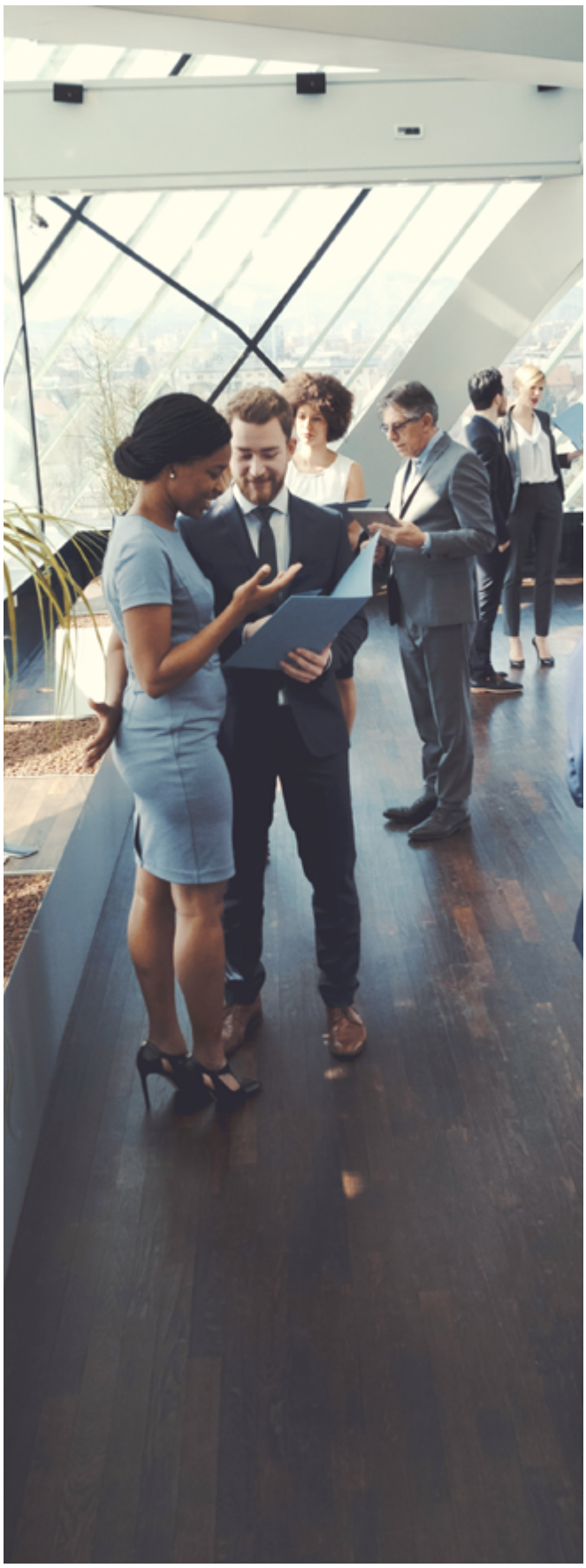
At the recruitment, stage adjustments could include: providing interview questions in advance; considering the use of a scribe or computer; making those interviewing aware of neurodiversity and the need to be inclusive and considering alternative assessment methods where appropriate.

During employment, adjustments could include: provision of assistive technology; provision of a private room or quiet area to work; offering flexible working arrangements; providing a mentor/ buddy and rewarding staff who actively support neurodiverse employees; holding manager training for understanding and accommodating neurodiversity; and creating a policy or guidance on neurodiversity at work to share with employees.

The benefits of a neurodiverse workplace

Thinking differently can bring obvious benefits to the workplace. Positive attributes commonly associated with neurodivergent employees can include: creativity and innovation; lateral thinking; strategic analysis; bringing a different perspective; and the development of highly specialised skills. While some time and resource might be required to ensure that the correct support is in place, there are clear advantages to having employees who are not neurotypical.

Demonstrating an employer's diverse and inclusive approach also brings benefits to the rest of the workforce through the creation of a supportive working environment, increasing the talent pool, reducing stigma and improving employee wellbeing and productivity.



Changing terms and conditions: a tricky issue

The COVID-19 pandemic has brought into sharp focus how quickly and unexpectedly things can change. The limitations on existing contracts of employment to accommodate changes has become evident. Going forward, contractual provisions previously considered unusual are likely to become common. These will seek to give employers greater flexibility. In the shorter term, many employers will be looking to make changes to terms and conditions beyond those already made to support claims under the Coronavirus Job Retention Scheme (CJRS, or furlough scheme). Here we look at how those changes might be implemented.

Refreshing employment contracts

Until now it has been rare for employment contracts to include a right to enforce short-term working or temporary lay-off. Many employers have had to do this in recent months without an existing contractual right to do so. The furlough scheme has undoubtedly made it easier for employers to obtain agreement to these changes. Employers would be wise to look at refreshing their standard employment contracts going forward to include express contractual rights to reduce working hours temporarily (short-term working) and to entitle them to require employees not to work without bringing the employment relationship to an end (lay-off). This would make it easier to enforce these changes should unexpected circumstances arise in the future.

Amended contracts can usually be presented to new staff on recruitment or to existing staff at the time of promotion without too much difficulty. It is generally harder when asking existing staff to sign up to new contracts unless the employer can offer something to persuade them to do so. If employers need to make more immediate changes, they might prefer to focus on those for now and make longer-term changes when the workforce is more settled.

Seeking agreement to new terms

Whether asking an employee to sign up to a refreshed contract of employment or asking them to accept a temporary change to particular terms, the best advice will always be to obtain express agreement. This provides certainty for the employer and the employee. However, it can be difficult to achieve where the changes are, or are perceived to be, detrimental to the employee.

Express agreement might be sought simply by providing an employee with a new contract or with a letter setting out the changes to their terms, and asking them to sign and return it to confirm their agreement. However, for more significant changes such as a pay reduction, reduction in working hours, or enforcing a period of lay-off, it is good practice to go through a period of consultation with employees to try to seek their agreement. What this consultation will look like will depend on an employer's particular circumstances; how many employees are involved; whether the circumstances require a collective consultation (see further below); and whether the workforce is unionised or subject to a collective agreement. However, broadly speaking a consultation might involve:

- an initial communication to employees about the proposed changes;
- meetings with individual employees or representatives to discuss the proposed changes, seek their views on them and, if possible, get their agreement;
- time spent considering any concerns raised and alternatives proposed by employees; and

- a further meeting to discuss the employer's response and (hopefully) reach agreement.

Problems arise, of course, where employees do not agree to the change. In some cases, the employer might simply decide to live with this (for the time being at least) and only enforce the change for those employees who have agreed to it. However, this might not always be an option for wider employee relations reasons, or where uptake of a change is not significant enough to have the proposed impact on the business.

Terminate and re-engage

Where the employer needs to ensure that all employees accept the changes proposed to their terms and conditions, and anticipates that securing that acceptance might be difficult, it might ultimately need to take the step of terminating the employment of those who do not accept, and offering them re-engagement on the new terms. This is clearly a very significant step and should usually only be taken following a period of consultation with the employee as outlined above. Indeed if it is anticipated that it may be necessary to dismiss and offer re-engagement to 20 or more employees, collective consultation obligations will arise. In this case, the employer will need to take certain steps, as it would in a collective redundancy consultation, including:

- ensuring consultation begins at least 30 or 45 days before the first dismissal (depending on the number of dismissals proposed);
- informing the Secretary of State of the proposed terminations on form HR1 (even if it intends to keep the same number of employees);
- informing and consulting with appropriate employee representatives (including an election process if relevant).

Following the end of the collective consultation process, the employer should again ask employees to agree to the changes to their terms. It would then be in a position to terminate the employment of those who refuse and offer them re-engagement on the new terms. Even after consultation this is a dismissal, so it is important that notice of termination is given, or paid in lieu, to avoid a claim for wrongful dismissal.

If a collective consultation process is not followed when it should have been, the employer faces the prospect of a claim and, if the Employment Tribunal finds in favour of the employees, an award of up to 90 days' gross pay per affected employee.

As if that were not enough, there is also a risk of a claim for unfair dismissal. This is possible even if the employee accepts the offer of re-engagement (although in these circumstances the loss may be minimal). When faced with such a claim, it is vital that the employer is able to show that it was reasonable to treat the employee's refusal to accept the new terms as justifying dismissal. This will require strong evidence as to both the business reasons for the change and the consultation undertaken.

Implied acceptance of new terms

An alternative to seeking express agreement to changesto terms and conditions is to rely on implied acceptance. Here, the employer imposes the new terms and relies on the employee's actions in continuing to work under those terms as acceptance. An attempt to enforce changes to key terms, such as a reduction in pay, working hours, or lay-off in this way will often cause significant employee relations issues. One option employers can consider is writing to employees and asking for express agreement by a certain date and, at the same time, stating that, if nothing is heard from the employee by that date, this will be taken as acceptance of the new terms. This only really works where the changes have an immediate impact, such as hours or duties. Attempting this approach when introducing a general right to place employees on short-time working or lay-off is unlikely to be effective unless used immediately.

There is also the risk that employees might continue to work but state they are doing so under protest. This can lead to claims for unlawful deduction from wages, breach of contract and, ultimately, constructive unfair dismissal sometime later.

Conclusion

Changing terms and conditions for existing employees can be complex when the change is to their detriment. However, with sufficient planning and advice to identify potential problem areas, it can still be possible to introduce changes smoothly and effectively. Every employer will have its own needs and priorities, and every workforce will be different. It is important to take advice on your individual circumstances before engaging in a change exercise.

Safety first: UK employment rights of health and safety representatives

Health and safety representatives have important functions to protect and promote employee safety in the workplace. The undeniable benefit of having health and safety representatives is that they know the workplace and can see the important safety issues that affect employees. The law recognises the importance of their role and so offers them specific rights and protections, which largely revolve around consultation with employers. Health and safety representatives can be either:

- appointed by a trade union (in which case their functions are set out in the Safety Representatives and Safety Committees Regulations 1977); or
- a representative of employee safety (in which case their functions are set out in the Health and Safety (Consultation with Employees) Regulations 1996).

A trade union recognised by the employer for collective bargaining purposes is entitled to appoint safety representatives, who must be informed and consulted by the employer over health and safety matters. Where there are no union safety representatives, the employees may elect employee safety representatives to consult with the employer. In this case the employer will need to organise elections for their employees to elect representatives and will need to ensure the elections are fair and open. The number of representatives that need to be elected depends on the size of the employer. Larger employers may have a number of business areas or constituencies each requiring a representative. Smaller employers may have fewer representatives or one for the whole workforce.

Health and safety representatives have the right to:

- take an active part in workplace risk assessments;
- investigate potential hazards and "dangerous occurrences", and examine the accident book;
- investigate complaints made by colleagues;
- carry out inspections of the workplace in work time, at least every three months;
- require their employer to set up and attend a safety committee;
- be consulted on new working practices and new technology;
- receive safety information from employers;
- attend training courses without loss of pay; and
- not suffer detriment or be dismissed as a result of performing their duties.

Do representatives have to be paid?

Generally, trade union representatives do not need to be remunerated for simply being a representative, but the right to be paid arises in respect of the right to paid time off. However, for duties carried out during work time, representatives will be paid their normal wage anyway. Both trade union appointed representatives and employee representatives are entitled to paid time off to fulfil their roles as safety representatives and to receive training. Employees are also permitted to take paid time off to stand for election as a representative. Safety representatives are entitled to paid time off for as long as is necessary to fulfil their functions. They have the right to paid time off to attend as much training as is reasonable.

How much should representatives be paid?

Representatives are entitled to be paid at their normal rate during the time off. Where pay varies with the amount of work done, the Safety Representatives and Safety Committees Regulations 1977 for trade union representatives and Health and Safety (Consultation with Employees) Regulations 1996 for employee appointed representatives provides for a method of calculating average earnings for that period. The methods differ slightly depending on which right is being exercised.

What legal risks must employers be aware of?

Employee representatives may bring claims for a failure to allow time off or to pay for such time off. Claims have the usual statutory time limit for employment tribunals and must generally be brought within three months of the relevant failure to allow time off or pay. Representatives also have the right not to suffer detriment or dismissal where they performed or proposed to perform any of the functions related to that post. In addition, any dismissal due to the employee having performed such functions is automatically unfair.

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- UK coronavirus job retention scheme: changes from July onwards announced
- Selection for suitable alternative employment – can an interview process ever be fair?
- Fifty years of the Equal Pay Act – is it enough?
- A gap in gender pay gap reporting
- The Employment Tribunals in England and Wales and in Scotland publish guidance for listing and hearing cases in COVID-19 FAQs

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK People Reward and Mobilty Hub – www.ukemploymenthub.com

In summary, employers should encourage, support and protect the role of health and safety representatives in their workplace, thereby creating a safer working environment. This is particularly relevant during the COVID-19 pandemic when risks in the workplace are heightened. There is no doubt employees will have concerns about returning to work. Having representatives may ease the transition and increase employee confidence as they someone they can go to, designated to listen to their concerns, and who has the ability to request and push for changes. The collaborative approach can really make a difference and allows a successful safety culture to develop. It also promotes a positive reporting system whereby employees feel they have a safe space in which to raise their health and safety concerns.

Key contacts

Virginia Allen
Head of People, Reward and Mobility UK, London
D +44 20 7246 7659
virginia.allen@dentons.com

Sarah Beeby
Partner, Milton Keynes
D +44 20 7320 4096
sarah.beeby@dentons.com

Ryan Carthew
Partner, London
D +44 20 7320 6132
ryan.carthew@dentons.com

Purvis Ghani
Partner, London
D +44 20 7320 6133
purvis.ghani@dentons.com

Mark Hamilton
Partner, Glasgow
D +44 141 271 5721
mark.hamilton@dentons.com

Alison Weatherhead
Partner, Glasgow
D +44 141 271 5725
alison.weatherhead@dentons.com

Michelle Lamb
Partner, Milton Keynes
D +44 207 320 3954
michelle.lamb@dentons.com

Jessica Pattinson
Head of Immigration, London
D +44 20 7246 7518
jessica.pattinson@dentons.com

ABOUT DENTONS

Dentons is the world's largest law firm, connecting talent to the world's challenges and opportunities in more than 75 countries. Dentons' legal and business solutions benefit from deep roots in our communities and award-winning advancements in client service, including Nextlaw, Dentons' innovation and strategic advisory services. Dentons' polycentric and purpose-driven approach, commitment to inclusion and diversity, and world-class talent challenge the status quo to advance client and community interests in the New Dynamic.

dentons.com

CSBrand-25638-PRM Newsletter-June-02 — 23/06/2020