

Managing your business as the country comes out of lockdown

Following the Government's announcement that the country is being gradually lifted out of lockdown, together with changes to the Coronavirus Job Retention Scheme and new guidance for COVID-19, we have prepared this briefing note for employers to assist them with dealing with the issues which may affect them as the country comes out of lockdown. This is up to date at the time of issue.

Why did I have to take COVID-19 seriously?

Employers have a duty of care under the Health and Safety at Work Act 1974 to protect the health and safety of their workforce, as well as those who may be affected by their business, including clients, customers and third parties. There is also the common law duty, as well as express and implied duties in Contracts of Employment to protect the health and safety of their workforce.

It is imperative that your business takes COVID-19 seriously, as numerous claims could arise, including wrongful, unfair and constructive dismissal, personal injury, discrimination and criminal prosecution. As a result, and in light of the fact that the situation is fluid and constantly changing, you must be ready to adapt and implement significant changes with little to no notice, as and when they are announced by the Government.

What is the Government's latest advice on work?

As the UK is adjusting its lockdown restrictions, the Government will be gradually winding down the numerous economic support measures in place for individuals and businesses, including furlough, loans and grants.

Work will not be the same after COVID-19, and therefore everyone must adapt and be prepared for significant changes, i.e. a new normal.

Workers are being openly encouraged to return to work, apart from those who are able to work from home and should continue doing so until further notice. A number of industries and sectors are not permitted to reopen, such as hospitality and non-essential retail, although the Government is planning to relax some of those restrictions from the summer.

The Government's advice about when not to return to work, i.e. symptoms of COVID-19 etc. are continually reviewed and updated. See our separate Coronavirus Briefing note for further details, as this will continue to be relevant for sickness absence, childcare and caring responsibilities.

What measures should my business be considering now?

Employers should be considering a number of measures now to comply with the Government's new Guidance:

1. Ensure existing policies and procedures are reviewed and updated in light of recent developments.
2. Review your IT systems and infrastructure, implement any changes, upgrades and security measures if arrangements such as homeworking are likely to increase or become more permanent, especially from a GDPR perspective.
3. Understand and budget for any hygiene and social distancing measures in the workplace, including sufficient and regular supplies of critical items.
4. Establish a specialist taskforce in your business, with their role to keep up to date with updates from the Government, World Health Organisation and Public Health England.
5. Create clear communication channels with your members of staff, including those working from home, those in the workplace and those on furlough, namely important updates and announcements, as well as guidance for line managers when dealing with members of staff.
6. Consider travel arrangements, both domestically and internationally, especially in light of any quarantine measures and implications from commuting with public transport.
7. Calculate the absolute minimum number of people who are required to operate the business in a worst case scenario, both in person in the workplace and those working remotely.

In any event, you should communicate these matters to your members of staff as early as possible, especially in advance of any plans to return to work, even if it is a phased return to work. This will help members of staff feel included and a valued member of the Company, as well as making them aware of whether any adjustments or alterations will be made to your standards and expectations.

How do I incorporate these adjustments to my business?

As businesses owe a duty of care to members of staff, adjustments may be needed to the workplace, including increased hygiene controls, additional cleaning of commonly touched areas such as door handles, bathrooms and kitchens, and the provision of handwashing facilities or hand sanitisers at every entry and exit point in the workplace.

The Government have produced detailed guidance which provides extensive information for businesses in the majority of workplace settings. The Government's guidance covers 8 different types of work, namely outdoor work, factories and warehouses, research facilities, offices, homes, takeaways, shops and vehicles.

In each case, you should carry-out a COVID-19 risk assessment and share the results with those who work in the workplace, as well as display the appropriate certificate to state the workplace is COVID-19 Secure. The Government expects all businesses with over 50 employees to conduct this assessment.

The main takeaway points from the Government's guidelines state that everyone in the workplace:

- Keep 2 metres distance from each other;
- Limit the number of people they meet on a regular basis;
- Work in a well-ventilated area, leaving windows and doors open;
- Keep their hands and face as clean as possible;
- Regularly wash their clothes; and
- Avoid crowds and large gatherings.

Increased hygiene will be crucial for businesses, and therefore consideration should be given to the provision of hand sanitiser around the workplace, not just common areas such as toilets. Introducing increased cleaning procedures for commonly touched surfaces and busy communal areas.

Maintaining social distancing will be difficult for some, but could be achieved through redesigned workplaces and seating arrangements, staggering start and finish times, creating one-way systems, increasing the number of entrances and exists. Introducing markers on the floor, avoiding the use of share workstations and limiting the number of clients and customers attending your premises will all be useful.

If social distancing is not possible, employees should wear a face covering if the workplace is in an enclosed space, as well as the use of barriers, team bubbles, and ensuring colleagues face away from each other. The use of screens and barriers can also be beneficial, as well as amending start, finish and lunch times, thereby limiting less movement around the workplace.

Individuals are being encouraged to avoid public transport wherever possible, and instead cycle, walk or drive, as well as avoiding travelling at peak times, and therefore you may have to consider flexible working.

How can I help employees return to work?

Your business should be taking all reasonable steps to assist employees getting back to work, whether that it in the office or at home. It would be beneficial to discuss working arrangements with members of staff sooner rather than later. In cases where additional employees may be permitted to work from home, discuss whether they require any additional equipment, such as a laptop or phone. It is also important to include members of staff in all necessary communications, thereby supporting their mental wellbeing, as well as avoiding the sending of crucial messages at the end of the day or the end of the week.

What should I do with vulnerable individuals who cannot work from home?

Individuals in these situations should be offered the safest role available in the workplace, as well as ensuring they are at least 2 metres away from colleagues. If social distancing is not possible, conduct a risk assessment and see if any further measures can be undertaken to protect the individual.

As employers have a duty of care to their staff, you must ensure that you do not do anything which could amount to a repudiatory breach, otherwise they might be entitled to resign and claim constructive dismissal.

Can individuals refuse to attend work?

An employee can reasonably refuse to attend work if you insist upon a return to work in limited circumstances, i.e. those who can work from homes and where a workplace does not have a COVID-19 Secure certificate. In addition, those who are advised by the Government to self-isolate and classed as vulnerable, including those who satisfy the amended statutory definition of sickness, i.e. those with or someone in the same household with COVID-19 symptoms, can lawfully refuse to attend work.

However, it is highly likely that individuals choose to self-isolate without medical advice. In these situations, the position is less clear and employers should tread with caution. Due to issues with the employer's duties of health and safety, employees could claim that they are blowing the whistle, and that if they suffer a detriment, could resign in protest and bring a claim of constructive unfair dismissal on the basis of being a whistleblower.

There may be members of staff who refuse to attend the workplace simply out of the fear from catching coronavirus. It would not be advisable to simply dismiss those concerns, but to listen and resolve them in order to protect their health and safety. Some interim measures such as flexible or home working could be explored. However if there is an outright refusal to attend work, this could result in you being able to take disciplinary action and withhold pay for misconduct, refusal to follow reasonable instructions and unauthorised absence, but again due to the risk of a tribunal claim, this should be pursued with extreme caution.

We can advise you further if there are any situations where you have a difficult employee who is refusing to attend the workplace without good reason.

Where can I get further information about working safely during COVID-19?

The Government's Guidelines on working safely during COVID-19 can be found on the [gov.uk website](https://www.gov.uk), which is where you can also download a copy of COVID-19 Secure certificate.

Information about conducting COVID-19 Secure risk assessments can be obtained on the [Health and Safety Executive's website](https://www.hse.gov.uk).

What happens to those on furlough and when the Job Retention Scheme comes to an end?

Over 7.5 million people have been placed on furlough since March 2020. From July 2020, furlough will still be available, albeit with some changes and adjustments as employers will be asked to contribute towards furlough pay. See our Furlough Bulletin for more details.

At some point in the future, your business will either need to consider what to do when the Coronavirus Job Retention Scheme is no longer available or is no longer appropriate for your business. In either scenario, there are a number of steps which could be taken to protect your business if it is or is likely to suffer:

1. If you have the contractual right to do so, you could invoke a temporary reduction in an employee's pay and benefits, hours of work or lay off members of staff. If the contractual right does not exist, you will need to engage in consultation with the affected employees. Whilst employees are unlikely to accept a reduction in normal circumstances, it might be accepted if it is explained that the alternative is job losses and redundancies.
2. Consider whether flexible working arrangements could be introduced, such as amended working hours and homeworking.
3. Require your employees and workers to take annual leave, thereby allowing your business to have a full workforce when the business fully reopens, although reasonable notice must be provided beforehand.

4. You could see whether any members of staff would volunteer to take a period of unpaid leave voluntary redundancy, thereby reducing the need to invoke any formal procedure.
5. Identify any employees, workers or self-employed contractors whose contracts can be terminated sooner rather than later without the risk of a breach of contract or unfair dismissal claim.
6. If it is likely that your business will suffer in the long term, consider whether that might mean having to make compulsory redundancies, and therefore assessing when to start redundancy consultations.

Is there any procedure to follow when end furlough leave for employees?

There is no legal mechanism for businesses to follow when they end furlough. However it follows that furlough leave will come to an end when funding under the Coronavirus Job Retention Scheme ceases, if you give notice that you are to reopen the business or if you give notice or start a process resulting in the termination of someone's employment.

It is quite likely that many employers will want furloughed employees back to work, and therefore should give reasonable notice, i.e. at least 1 week, or longer notice if specified in any furlough agreement, to warn them that they are required back at work.

In any event, you should be in regular communications with your staff, including updates in relation to any plans to end furlough, thereby allowing sufficient time to resolve any concerns from staff about returning to work.

Information that should be provided to employees before furlough comes to an end includes the following:

1. The steps you are taking or have taken to ensure the workplace is safe.
2. Whether any temporary or permanent changes need to be imposed or consulted with employees.
3. Whether any policies or procedures have been amended in light of COVID-19, including capability and disciplinary matters.
4. Reminding employees of key contractual obligations and sign posting important procedures, i.e. confidentiality restrictions, sickness absence procedure and employee responsibilities and obligations.
5. Measures taken to ensure compliance with the Government's Guidance, including the use of public transport to and from work, social distancing and reducing the spread of the virus in the workplace.
6. Special measures for those who are shielding and vulnerable.
7. Clarification about any non-contractual and discretionary benefits, bonus and commission schemes.
8. Reminding employees about their annual leave entitlement, whether it needs to be taken at a specified time, or whether the Company to utilise the Government's allowance to carry-over annual leave to the next 2 holiday years.

What happens if I am planning a phased return to work for some employees on furlough?

In the same way that employers may come under scrutiny for the process in deciding who was placed on furlough, you must also be cautious about who and when you allow anyone back to work from furlough.

There are a number of considerations, including which jobs and skills are required in the workplace, whether everyone is needed back immediately or whether anyone cannot practically return to work, i.e. childcare responsibilities.

It is important to emphasise that businesses have a duty under the Equality Act 2010 to not discriminate against members of staff because of a protected characteristic, such as sex, age or race. Therefore you must ensure individuals are not singled out or selected simply because they have a protected characteristic otherwise this could amount to discrimination.

How can we help you

Please contact us if you require any advice on any of the employment and HR issues referred to above. The team is on hand to advise and assist.

In addition we can assist you in drafting a bespoke advice and documentation for your business. Please contact Sally Morris on 01905 610410 or at sally.morris@mfgsolicitors.com to discuss this offer further and any frequently asked questions.

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Advice is up-to-date as of 04.06.2020

mfgsolicitors.com 0845 55 55 321  [@mfgsolicitors](https://twitter.com/mfgsolicitors)

Offices in Kidderminster, Worcester, Bromsgrove, Telford, Ludlow and Birmingham.

mfg Solicitors LLP is a Limited Liability Partnership registered in England, number 0C317146 Registered Office:
Adam House, Birmingham Road, Kidderminster, Worcestershire. DY10 2SH

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