

EMPLOYMENT LAW BULLETIN

JUNE 2020

Welcome to the Wrigleys Employment Law Bulletin, June 2020.

From the beginning of next month, the Coronavirus Job Retention Scheme will be changing. In our first two articles this month, we look at some of the detail of those changes. These include the opportunity for employers to bring their workers back to work for some hours while being furloughed for others from 1 July, and the month-by-month reduction in financial support for employment costs from August to October.

It seems likely that, in light of continuing safety concerns, many organisations will maintain significant numbers of employees working from home into the Autumn and beyond. We consider the issues for employers who wish to monitor employee communications while employees are working from home.








The recent High Court case of ***Duchy Farm Kennels Limited v Steels*** provides useful guidance on when an employer might be able to stop making payment instalments under a settlement agreement following a breach of confidentiality by a former employee.

We report on the interesting tax tribunal case of ***HMRC v Professional Game Match Officials Limited*** which examines the employment status for tax purposes of part-time football referees.

And in our Question of the Month for June, we answer the tricky question of how quarantine periods should be handled by employers where employees have travelled abroad on holiday.

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

Forthcoming webinars:

- **Wrigleys Charities Webinar Series: Restructuring social investments and other sources of funding**
1 July 2020, Webinar
For more information or to book 
- **Flexible working Part II : Re-organising and flexible working**
7 July 2020, Webinar
For more information or to book 
- **Wrigleys Charities Webinar Series: Mergers and collaborative working**
15 July 2020, Webinar
For more information or to book 
- **Wrigleys Charities Webinar Series: Restructuring your organisation from the inside out**
22 July 2020, Webinar
For more information or to book 
- **Equality in the workplace - transgender discrimination**
4 August 2020, Webinar
For more information or to book 
- **Equality in the workplace - disability and reasonable adjustments**
1 September 2020, Webinar
For more information or to book 
- **Equality in the workplace - atypical working, zero hours and ethical issues**
6 October 2020, Webinar
For more information or to book 

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Furlough scheme changes include 10 June cut-off date for staff who have not yet been furloughed

Government outlines changes to the Job Retention Scheme to take place between July and October 2020.

The Chancellor of the Exchequer, Rishi Sunak, gave a [speech](#) on 29 May outlining changes that the government will make to the Coronavirus Job Retention Scheme ('CJRS'). These changes will have an impact on employers' plans for using CJRS moving forward.

An important element for employers is that a new cut-off date of 10 June will be applied for staff who have not yet been furloughed as CJRS is adapted to increase its flexibility. More detail on this, and other key changes coming into effect, is set out below.

Incoming changes

The speech set out the context in which the Government was making changes to CJRS. In particular, hopes that businesses will soon be able to re-open were highlighted, provided that those workplaces are 'Covid secure' to protect staff and customers.

The Chancellor was keen to highlight that CJRS could not continue indefinitely and would only remain in place until the end of October 2020. Before it ends the government will ask employers to contribute to the costs of keeping staff on furlough, and the government intends to introduce flexibility to CJRS.

Moving forward, employers will be asked to pay increasing contributions to the costs of keeping employees on CJRS. The government's reasoning is that by September employers will have had the opportunity to make any necessary changes to their workplaces and business practices to allow them to return to more normal operations and to reintroduce staff to work. The increases will occur on an incremental scale:

- From August, HMRC will continue to contribute 80% of furloughed staff wages, but employers will be asked to recommence payments for employer National Insurance and employer pension contributions. These costs are currently covered by CJRS and are calculated by HMRC to be, on average, 5% of total employment costs.
- From September, HMRC will reduce its contribution to 70% of furloughed staff wages, with employers contributing 10%, in addition to NI and pension payments.
- From October, HMRC contribution will reduce to 60% and employers' contributions will rise to 20%.
- The JRS will then close at the end of October.

Increased flexibility

In addition to the above measures HMRC are restructuring CJRS to make it more flexible. From 1 July employers will be able to return staff to work on a part-time basis whilst they remain on furlough. Employers will have to pay staff for the time they work as normal, while CJRS continues to cover staff costs for the days they are not at work, subject to the change in contribution levels outlined above.

In order to introduce the new flexible scheme, HMRC will close the CJRS to new entrants on 30 June. Employers wanting to place staff onto CJRS, where they have not previously been furloughed, will need to do so by 10 June to allow them to complete the minimum (3 week) furlough period before 30 June.

Further detail is awaited on how this will work in practice, including an apportionment of the cap between HMRC's contribution and that of the employer (i.e. balancing any furlough payment against actual working time).

Comment

The Chancellor stated that there will be no further extensions to CJRS.

The incremental reduction in support from HMRC and the increasing requirements on employers appear to have been set arbitrarily by date rather than by any other metric. This approach appears to be based on some wide assumptions about what employers will have been able to do to get ready to re-open their businesses and / or return their staff to work. For this reason employers should continue to carefully plan ahead and consider what impact, if any, the changes above will have on their operations and staff.

The CJRS, flexible furlough and the importance of getting it right

New Government guidance on flexible furlough published and new HMRC enforcement powers announced

As the UK attempts to emerge from lockdown and to get the economy moving once again, the Government has published [guidance](#) on upcoming changes to the Coronavirus Job Retention Scheme (CJRS). These changes aim to provide employers with the flexibility to bring employees back to work part-time while retaining some level of support for employment costs.

From 1 July the CJRS will be much more flexible and, perhaps inevitably, much more complex than before. From that date, employers will be able to bring furloughed employees back to work for any amount of time and on any work pattern, whilst still being able to claim a grant for the hours not worked. For example, an employer and employee can agree that the employee will return to work three days a week and remain furloughed for two. Similarly, an employee could work each morning and be furloughed each afternoon.

Agreed flexible furlough arrangements from 1 July can last any amount of time (as opposed to the minimum three consecutive week period required under scheme up to 30 June). However, when claiming funds from the CJRS the minimum claim period will be 7 calendar days (unless employers are claiming for the first few days or the last few days in a month).

For the non-working hours, the employee is furloughed and will continue to be prevented from making money for or providing services to their employer (or any organisation linked to their employer). Employees can however continue to take part in training, volunteer for another employer or organisation or work for another employer during furloughed hours, if that is contractually allowed.

To be eligible, an employee being furloughed from 1 July must have been furloughed for a period of 3 consecutive weeks prior to this date, at any time between 1 March and 30 June. The last day an employee could start furlough leave for the first time was 10 June. However, the Government has [announced](#) that the 10 June cut off date will not apply to those who return to work after that date following a period of statutory maternity, paternity, adoption, shared parental or parental bereavement leave.

Agreeing flexible furlough with employees

The guidance makes clear that employers will need to agree new flexible furlough

arrangements with employees or their trade unions (where a collective agreement is in place) and ensure that the agreement is confirmed in writing. This written confirmation should be kept for five years. Employers should also keep careful records of worked hours and furloughed hours in each calendar month.

Please see our previous articles on the importance of [recording the furlough agreement](#) and [the risk of claims entailed in furloughing staff](#) which remain of relevance.

Making a flexible furlough claim

The Government has published a number of [updated guidance documents](#) which take employers through the technical aspects of making a claim, including worked examples, such as [this example calculation](#) for an employee on fixed hours who returns to work for half days.

In very simple terms, in July employers will be able to claim 80% of pay for each furloughed hour, along with employer NICs and pension contributions in relation to those furloughed hours. The wage cap of £2,500 still applies, but is proportional to the hours an employee is furloughed. For example, the wage cap for an employee who is furloughed for 60% of their normal hours will be 60% of £2,500.

Because these changes will take effect from the beginning of July, employers cannot make a claim under the flexible furlough arrangements until 1 July. Claims must relate to periods falling within the same calendar month to take into account the month-by-month changes to the scheme from August to October (see below). It is also important to note that claims for any period before the end of June must be made before the end of July.

Upcoming changes

From 1 August, employers will not be able to claim employer NICs or pension contributions but will still be able to claim for 80% of wages for furloughed hours (subject to a pro-rated £2,500 monthly wage cap). From September, support for wages will reduce to 70% of pay for furloughed hours (subject to a pro-rated £2,187.50 wage cap) but employers must top up pay to 80% or £2,500 (whichever is the lowest). From October, support for wages will reduce again to 60% of pay for furloughed hours (subject to a pro-rated £1,875 wage cap). The furlough scheme will end on 31 October 2020.

Further detail of these changes can be found in [our previous article](#).

The importance of getting it right

The new calculations are complex and where possible employers are advised to use the Government's [online calculator](#). If employers cannot use this calculator for any reason they are advised by HMRC to work out what they can claim manually using the calculation guidance or by seeking professional advice from an accountant or tax adviser.

It is the employer's responsibility to check that the amount its claiming for is correct. Because of this it is important to keep for 6 years copies of calculations and the basis upon which calculations are made so that employers can support the decisions made should HMRC audit the claims.

New HMRC powers to reclaim overpayments under the CJRS

The Government intends to bring in [new HMRC enforcement powers](#) in relation to fraudulent and inaccurate claims under the CJRS in the upcoming Finance Bill. If passed, the new legislation will give HMRC the power to apply income tax of up to 100% on payments under the scheme where it finds that employers were not entitled to the payment or where the

payment has not been used to pay furloughed employee costs. HMRC will also be able to charge a penalty in cases of deliberate non-compliance. The penalty will only apply if the employer fails to notify HMRC about the non-compliance within 30 days. Company officers can be made jointly and severally liable for the charge to tax if they are found to be culpable for making a deliberately false claim under the scheme.

Employee monitoring and Covid-19

What are the implications of monitoring employee communications in the current crisis?

Many employers perform some kind of communication monitoring of their staff to help an employer keep track of employee performance and/ or in an effort to protect the organisation or its clients or customers.

In the current coronavirus situation, with an increase in staff working in isolation or from home, employers will need to reconsider how to best apply employee such monitoring policies and procedures. This article considers the main points employers should consider if they wish to put employee performance and communication monitoring in place and what adjustments may be needed if staff are working differently due to coronavirus.

Why use monitoring?

The reasons vary. For example, monitoring staff emails and internet usage may provide evidence of an individual's performance or productivity, or identify behaviour that will potentially damage the employer's reputation.

Monitoring communications may also help to identify possible legal liabilities. For example, by scanning emails or websites for key 'danger' words or phrases employers might identify instances of harassment and discrimination, defamation and the transmission of confidential information and trade secrets. There are also obvious security reasons to monitor communications to protect an employer against hacking and computer virus transmission.

What are the issues with monitoring employees?

Article 8 of the European Convention on Human Rights ('ECHR') enshrines an individual's right to respect for a private and family life, home and correspondence, but this right is not absolute. Case law in particular has explored the balance of the rights under Art 8 ECHR and the circumstances in which this right can be interfered with.

For example in the case of [Lopez Ribalda and Others v Spain \[2019\]](#), which considered covert video surveillance placed above staff at their workstation, the European Court of Human Rights outlined six key areas that need to be considered when assessing if such surveillance, and by extension any employee monitoring, is in breach of the employees' Art 8 rights:

- the degree to which prior notification of the possibility and the implementation of monitoring was given, as well as to its exact nature;
- the extent of the monitoring, meaning the degree of limitations in time and space as well as the number of people with access to the footage;
- the legitimate reason to justify the monitoring;
- the possibility of implementing less intrusive methods;

- the severity of consequences of the monitoring; and
- the provision of legal safeguards for the employees (i.e. in order for them to challenge the measures before an independent body).

This guidance needs to be read in line with national legislation. Under the Investigatory Powers (Interception by Businesses etc. for Monitoring and Record-keeping Purposes) Regulations 2018 (the 'IPR'), monitoring may be permitted providing it falls within specific categories (see below) and the staff who are, or may be, monitored are given clear and advanced notification of monitoring and its extent.

How does an employer set about monitoring legally?

The employer will need to have a clear structural approach to employee monitoring. The IPR sets out three main ways an employer can legitimately monitor its employee's communications.

1. Monitoring with consent. This requires consent of both the sender and recipient of the communication and is the reason for automated 'this call is being recorded' messages.
2. Monitoring without consent. This is subject to employers being able to show that the monitoring was needed to:
 - a. ascertain compliance with regulatory or self-regulatory practices or procedures that are relevant to the business;
 - b. ascertain or demonstrate standards that ought to be achieved by persons using the systems (i.e. internal quality control);
 - c. prevent or detect crime;
 - d. investigate or detect the unauthorised use of a telecommunications system; or
 - e. ensure effective operations of the system itself.
3. Monitor without consent, *but not record* communications. This can only be done to either determine whether communications are relevant to the business, or if monitoring the communication is related to an employer considering the amount of use its staff have for remote support services e.g. anonymous counselling and helplines.

It is also worth noting that monitoring of electronic communications at work may amount to data processing, which will necessitate a data protection impact assessment to comply with data protection legislation. The ICO provides useful [guidance](#) on this issue.

What should employers have in place?

Employers should have an electronic communications policy in place, which will often cover internet use. Ideally, this should extend beyond the issue of monitoring and seek to set out standards. It should also cross-refer to other relevant policies and address the risks and hazards arising from inappropriate communications use and internet access, clearly setting out the level of monitoring being undertaken and the reasons why this is necessary.

The policy needs to be well publicised so that staff can easily access it and ideally it needs to be given to employees at the start of their employment or otherwise circulated to staff when the policy comes in to effect. Employers should make sure that employees have been asked to confirm that they have read the policy and accepted its terms. Best practice would be to send out regular reminders that the policy is in place and provide information to staff on any changes to the policy as they occur. In order to ensure fair treatment, employers should also follow up by checking that employees are complying with the terms of the policy.

In accordance with data protection obligations, employers should also have in place an

appropriate privacy statement, which links employees to the relevant monitoring processes.

How does coronavirus impact on employee monitoring?

For those employers who already had employees on flexible working arrangements and who considered the impact of an electronic communications policy on home or remote working, the impact of the current situation will be limited.

However, employers should consider precisely how their staff are communicating with others when working from home and whether it is appropriate to be able to monitor these communications. For example, to what extent would an employer's monitoring impact on people living with the employee and is it appropriate to carry on with monitoring of certain communications if this effectively means monitoring the employee in their own home and on their own devices? There are important questions of scope and purpose in monitoring employees outside of their usual work environment and employers must consider what data transmitted or made available in the current circumstances is relevant to their identified legitimate aims.

The increased use of work systems and devices at home also raises important issues of digital security – not just for the employer but for the employee. For instance, given the potential exposure of added audio-visual data that could be transmitted on work related calls and video conferences, are employees' properly safeguarded against unauthorised or unwanted access from third parties?

Also, employers need to consider the extent to which they maintain performance monitoring in the current circumstances. For example, given the current situation is it appropriate to keep the same level of monitoring up? Can employers reasonably expect employees to maintain the same output of work from home as in the office or should less be expected of staff?

Conclusion

Employers need to consider whether their policies and procedures relating to data processing and security and employee monitoring have kept up with the real-world developments created by the impact of coronavirus and whether the technology that has been put in place to help organisations continue to work creates any additional issues or obligations.

In particular, where employers have had to scramble to adapt to the current situation, time should be taken to review where gaps may have developed in the employer's data protection policy coverage. Employers should also consider to what degree and on what basis employee monitoring has been put in place or is desired and whether sufficient policies and notification has been put in place to avoid breaching employee rights.

Breach of confidentiality clause did not entitle an ex-employer to stop making payments under a COT3 agreement

Decision highlights the limits of a generic confidentiality clause in settlement agreements.

When using settlement agreements, employers are primarily concerned to settle any actual (or potential) employment tribunal claims in exchange for payment. Depending on the circumstances, employers may also be keen to keep the existence and details of such settlements confidential, perhaps because of reputational risks and / or because of the risk that

other employees will be encouraged to bring claims against the employer.

However, most settlement agreements contain confidentiality clauses as standard, whether or not confidentiality is among the chief concerns of the parties.

It is a common misconception that breach of a confidentiality clause contained in a settlement agreement automatically entitles an employer to recover, or cease paying, sums due under a settlement agreement. As highlighted by a recent decision of the High Court, the options available to an employer in these circumstances will vary depending on the importance placed on confidentiality by the parties.

Case details: [Duchy Farm Kennels Limited v Steels \[2020\]](#)

Mr Steels brought a number of claims in the Employment Tribunal against DFK, including unfair dismissal. A settlement was negotiated with the assistance of ACAS and recorded on a COT3 form (a simple form of settlement agreement ratified by ACAS).

Under the terms of the COT3, DFK agreed to pay Mr Steels £15,500 by way of 47 weekly instalments in full and final settlement of his claims against DFK. It included a standard confidentiality clause stating that both parties would not disclose the fact or terms of the agreement to anyone else, unless required to do so by law or a regulatory authority or to a party's professional advisors.

After several weeks the Managing Director of DFK heard that Mr Steels had told a third party about the settlement and the money he was receiving under it. As a result, DFK stopped paying the weekly instalments and Mr Steels issued proceedings in the County Court to enforce payment of the settlement monies.

At first instance, the judge held that Mr Steels had breached the confidentiality clause but that the nature of the clause meant DFK was not entitled to stop paying the settlement monies. DFK appealed the decision.

The High Court concluded that the County Court was correct that the confidentiality clause was not a condition (or fundamental term) of the contract. This was on the basis that the core issue of the COT3 was to settle Mr Steel's Tribunal claims and neither party had placed any importance on the confidentiality clause at the time the COT3 was entered.

The High Court also agreed with the County Court that the breach of confidentiality in this case was not serious enough to entitle DFK to 'repudiate' the contract, in other words to treat the contract as terminated, and to stop paying Mr Steels. It held that the breach of the confidentiality clause was unlikely to result in significant damage to DFK. As the High Court judge noted, the core of the disagreement between the parties, an unfair dismissal claim, was a common issue and the risk of reputational damage was minimal. In addition, evidence suggested that third parties were already aware of the circumstances surrounding Mr Steel's departure from DFK and that the parties had likely settled. In the view of the courts, there was minimal risk that Mr Steel disclosing the existence and terms of the COT3 to a third party would lead to unmeritorious claims by other employees against DFK because the sums involved were relatively small.

Conclusion

This case highlights the importance of parties clearly communicating what elements of a settlement agreement are important to them when negotiating terms. In this case, the COT3 used standard confidentiality wording and neither the surrounding circumstances nor the actions of the parties suggested that confidentiality was a key term of the agreement.

In such cases the innocent party is left to show that the breach is so serious that they are entitled to set aside the contract and no longer be bound by its terms. This is a fairly high bar and whether it is met will depend on the surrounding facts. It is also worth noting that the employer may not want to terminate the agreement entirely if it wants elements of the settlement agreement to remain in place, such as an agreement by the employee not to pursue any claim (which may in any event become time barred) or to make or publish adverse comments about the employer.

The High Court judge noted that it is possible for employers to avoid this type of situation by expressly stating that confidentiality is a condition of the agreement or to making it clear in the agreement that there will be consequences (which may fall short of treating the agreement as terminated) for a party who breaches confidentiality.

However, this decision will no doubt cause some concern for employers that confidentiality terms in a settlement agreement may not be relied upon. There may still be steps employers can take to enforce confidentiality provisions, such as seeking an injunction against further breaches of confidentiality or to seek compensation for any damage. Such steps can of course be costly and may not be timely enough to limit reputational damage; it is also notoriously difficult to evidence any actual financial loss arising from the breach.

Employers should ideally seek advice on the terms of settlement and remember that ACAS will assist with reaching agreement but cannot provide independent advice.

Whilst bearing all the above in mind, employers also need to be careful how they set out confidentiality clauses, particularly when issues of discrimination, harassment or victimisation are factors in the wider settlement, as failure to do so may also result in the clause being unenforceable. For further information, we considered these issues in an article in [November 2019](#).

Referees' employment status case sheds light on important elements of contract of employment

Tax tribunal decision offers helpful summary of the law on employment status.

The law concerning the definition of employment status is complex and nuanced, and there is a risk that employers seeking to engage staff as independent contractors can inadvertently enter into an employer-employee relationship, particularly if there is a significant degree of oversight by the employer as to how the job is carried out.

A recent case from the Upper Tax Tribunal ('UTT') has considered this complicated area in relation to football referees who were engaged by Professional Game Match Officials Limited ('PGMOL'). The question in this case was whether the referees were in employment for tax purposes, rather than deciding whether they were workers or employees for employment law purposes (e.g. to establish employment rights or protections).

The case focussed on two key concepts for the purposes of determining an employment relationship. The first, "mutuality of obligation", is a necessary component of an employment relationship because an employer must be obliged to provide work to an employee and the employee must be obliged to perform the work assigned to them. The issue of mutuality of obligation is complicated further by the fact that it is also required to simply establish a contract, but it is the degree to which mutuality of obligation exists in the contract to provide and perform work which determines if an employment relationship is created.

The second key concept considered is that an employee must be subject to a “sufficient degree of control” by an employer as to how, when and where they undertake their duties.

Without these elements of the relationship, the referees would be deemed to be independent contractors.

Case details: [HMRC v Professional Game Match Officials Limited \[2020\]](#)

Background and initial decision

PGMOL oversees the management and administration of refereeing of professional football. Via various contractual arrangements PGMOL engages referees to officiate at matches, primarily in Leagues 1 and 2 of the Football League, but also in the Championship and FA Cup, as well as providing officials to the Premier League. These referees were known as “national group” referees, who undertook their duties in their spare time, typically alongside other full-time employment.

HMRC determined that the relationship between the officials and PGMOL was that of an employer and employee and sought to recover PAYE and national insurance contributions from PGMOL on this basis. PGMOL appealed this determination by HMRC to the tax tribunal.

The First Tier Tax Tribunal (‘FTT’) found that there was an overarching contract between PGMOL and each of the national group of referees, and separate contracts between PGMOL and each referee in relation to specific matches for which they were engaged to officiate. However, the FTT concluded that there was insufficient mutuality of obligation between the parties and also insufficient control exercised by PGMOL over the referees to establish an employment relationship (for reasons explored below). Accordingly the referees were independent contractors who were not in employment for tax purposes and no PAYE or national insurance contributions were due from PGMOL.

HMRC appealed to the Upper Tribunal.

Appeal

Reviewing the elements of the decision relating to mutuality of obligation, the UTT upheld the decision of the FTT that the overarching contracts did not include an obligation for PGMOL to provide work or on match officials to accept work that was offered. This included FTT’s finding that the referees and PGMOL were able to withdraw from a specific match engagement for any reason without breaching the contract. Accordingly, the UTT agreed that the FTT was entitled to find that there was insufficient mutuality of obligation to create an employment relationship.

However, regarding control the UTT found that the FTT had erred in its conclusion about the extent to which PGMOL had control over the overarching contract with match officials. It found that PGMOL did have an enforceable contractual right to “step in” and remove a match official before a match began. As a result, the UTT found that the FTT had given insufficient weighting to the total contractual control exercised by PGMOL in respect of the individual match contracts.

It is worth noting that the FTT concluded that PGMOL had an insufficient contractual right of control during individual engagements because, amongst other factors, the match officials had full authority over the performance of their job on match days and their decisions within games were final. In addition, if any professional issues arose it was the Football Association which dealt with regulatory breaches by the officials at matches or elsewhere.

However, because the UTT had upheld the FTT’s decision in respect of mutuality of obligation, it did not overturn the decision.

It is also worth noting that the UTT was not convinced by HMRC’s argument on appeal that the FTT had not sufficiently considered the “real world” realities of the working arrangements when coming to a conclusion about the degree and extent of the mutuality of obligation and control exercised in the contracts. The UTT found that the FTT had considered relevant factors such as that the motivations of match officials to officiate at the highest levels possible and the impact this had on their compliance with various non-binding expectations set by the PGMOL (e.g. fitness training), when concluding that there was insufficient mutuality of obligation and control to create an employment contract.

Conclusion

This case provides a very useful consideration of the case law around employment status through the lens of the UK’s tax tribunals. In particular, it helps to highlight that sufficient mutuality of obligation to create a contract does not of itself mean there is enough mutuality of obligation to create an employment contract. Likewise, the consideration in this case of expectations in a contractual arrangement not necessarily amounting to contractual obligations in the “real world” indicates that it is possible for parties to draft contracts with some indication as to their specific performance without creating the control elements of an employment relationship.

However, it is worth noting that employment status is still heavily fact dependent, and so the wider application of this outcome to other workers and professions is likely to be limited. Indeed the decisions in this case do not mean that the same conclusions would be arrived at by an Employment Tribunal, if it were asked to consider the employment status of an individual seeking the benefits and protections of being an employee.

This decision also highlights that employers face risks from two separate distinct sources when considering claims and actions related to employment status – the first being individuals seeking to establish their employment status at a tribunal, and the second an inquisitorial HMRC seeking to recover National Insurance and tax contributions.

Question of the month: what happens if our staff have to quarantine after travelling abroad?

With new quarantine rules in force, can employers exercise control over where an employee goes on holiday or whether they go on holiday at all?

With restrictions on travelling away from home expected to ease in the not too distant future, the prospect of being able to get away this Summer is perhaps now more than just a lockdown dream. But with that, new quarantine rules have come into force which could seriously impact on the ability of employees to attend for work after a holiday overseas. We have been asked by employers how they should respond to this risk. Can they exercise control over where an employee goes on holiday or whether they go on holiday at all? And how should absence from work be categorised if it is because of quarantine imposed after returning to the UK?

The new quarantine rules

People who come into the UK from anywhere other than Ireland, the Isle of Man and the Channel Islands are now required to quarantine themselves for 14 days under regulations which came into force on 8 June 2020. Those who live with the person in quarantine do not need to self-isolate unless they or the quarantined person develop symptoms of Covid-19.

The government has published [new guidance](#) on the quarantine rules which makes clear that non-UK citizens may be refused entry to the UK if they refuse to self-isolate and that fines can be levied for failing to self-isolate or to give accurate details of where you will be self-isolating.

There are some exceptions to these rules. These include people who live outside the UK but work in the UK and travel between their country of residence and the UK at least once a week, road haulage and freight workers, pilots and flight crew, Eurotunnel drivers and crew, seamen and masters, and postal workers transporting mail into and out of the UK. Also excepted are medical professionals who are travelling to the UK to help with the response to the virus.

Is quarantine a period of sick leave? And if not, what will the employee be paid?

If the employee who is in quarantine can work from home then they should do so and should be paid as normal. However, if they cannot work from home, the question arises as to what kind of leave they are taking and whether statutory or contractual sick pay will be payable.

There is no clear guidance on this point at the time of writing. Changes to the statutory sick pay (SSP) rules made previously mean that people will qualify for SSP (subject to eligibility) for periods when they are: self-isolating because they have symptoms of the virus; living with someone who has symptoms; self-isolating because they have been instructed to do so through the test and trace system; or shielding because they are in the extremely clinically vulnerable group. Someone who is under quarantine and does not fall into these categories would not currently be eligible for SSP. It has been reported that HMRC has given unofficial indications that it will not be changing the rules to allow those who have been abroad and are instructed to quarantine to receive SSP.

The contractual position will depend on the wording of the provision for sick pay in the contract of employment. Where sick pay would not be payable under the contract, employers may decide on a discretionary basis to pay contractual sick pay for periods of quarantine in order to encourage staff not to attend work. However, they may also decide that it would not be appropriate to extend any discretion to pay sick pay in circumstances where the employee travelled abroad voluntarily and could have avoided the consequent quarantine restrictions.

Alternatively, the quarantine period could be booked as a further period of annual leave, where entitlement allows, or taken as a period of agreed unpaid leave. If no agreement is made about the quarantine period, the additional absence may be unauthorised leave and lead to a disciplinary process (see below).

Can we stop our employees travelling abroad?

Employment contracts and holiday policies may enable employers to restrict employee holidays to some extent. For example, they will usually require employees to seek permission to take holiday and may allow employers to cancel holiday in certain circumstances. If the contract is silent on whether employers can cancel holiday, employers can do so as long as they provide notice. The notice must be as long as the length of the holiday, for example, a week's notice to cancel a week's leave. It is good practice for employers to bear the cost of holidays cancelled in this way, where these are not covered by the employee's insurance.

It is unlikely that current policies will allow employers to prohibit foreign travel. Indeed, there may be no mechanism in the policy for checking whether the employee intends to travel abroad. Employers who are particularly concerned about the impact of quarantine on the organisation might consider putting in place a new policy setting out clear expectations for staff.

Employers should follow their usual protocols for bringing in such policies. For example,

employers should share the draft policy with staff for comment before it is finalised. Where relevant, employers should consult with trade unions or other employee representatives. Contractual policies should only be changed in agreement with employees or their representatives.

Could travelling abroad be a disciplinary issue?

Where employers have in place a clear policy or procedure for booking a foreign holiday under the current circumstances, and these rules are not complied with, this could be a disciplinary issue. It is, however, important to communicate with staff in advance so that expectations are clear and well understood.

Because it is a criminal offence for people to leave their homes during quarantine, employers should not put pressure on the employee to break quarantine and attend work. However, where the employee has failed to follow the rules on booking holiday, and that failure has led to an unauthorised absence from work, employers might choose to deal with this through their disciplinary procedure.

This will not be as clear cut perhaps where the employee has had the trip booked for some time and could not have been expected to know that quarantine would apply. In those circumstances, it may be advisable to come to an agreement with the employee to authorise the extended leave, or to cancel the annual leave and reimburse them for the costs of the trip not recovered through insurance.

The risks of cancelling or prohibiting holidays overseas

Employers who enforce their right to cancel holiday or threaten to invoke a disciplinary procedure if a holiday goes ahead, should only do so for good business reasons. This is because an employee could argue that their employer was in breach of the implied term of mutual trust and confidence by taking the decision and resign in consequence, bringing a constructive dismissal claim. The employer would then have to show that they had a reasonable and proper cause to act as they did. A written note of the specific financial and/or operational impact on the organisation of the employee being away from the workplace for an additional two-week period would be very helpful to defend such a claim.

Employees who are not British nationals and who travel abroad to see close family might argue that an employer policy forbidding foreign travel is indirectly discriminatory on the ground of nationality as it disadvantages them and those who share their protected characteristic. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim. Here, the employer would need to show that there were strong business reasons for the policy which outweighed the discriminatory impact on the employee.

Thinking ahead, consulting employees, and communicating clear expectations and business reasons for policy decisions should help to mitigate the risk of conflicts and claims, as employers and employees navigate their way through the next few months of challenge and uncertainty.

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