

A microscopic view of a coronavirus particle, showing its characteristic spherical shape with a textured surface and several protruding spike proteins. The particle is rendered in shades of orange and yellow, with a greenish-blue background. The image is semi-transparent, allowing the text to be overlaid.

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TOP 10 QUESTIONS FACING UK EMPLOYERS IN THE MODERN WORKPLACE

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23 April 2020

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Today's agenda

1. Is our company eligible to access the Job Retention Scheme?
2. What process do we need to follow to furlough employees?
3. Can we lawfully reduce salaries?
4. How can we manage staff holidays and requests to cancel or carry over?
5. What happens if an employee wants to volunteer during furlough leave?
6. How can we effectively monitor and manage employees who are working remotely?
7. Can we perform health tests on our employees?
8. What about migrant workers?
9. Can we delay or change bonuses?
10. What will change for employees when the lockdown ends?

Is our company eligible to access the Job Retention Scheme?

The scheme is open to **any UK organisation with employees**, including businesses, charities, recruitment agencies, and public authorities (employers who receive public funding for staff costs should not furlough employees).

The scheme is open to all UK employers that:

- Had a PAYE payroll scheme on **19 March 2020**
- Have enrolled for PAYE online
- Have a UK bank account

There is no need for an employer to show that it is suffering any form of financial hardship in order to claim.

Employers need to claim using an online service, which opened on **20 April**.

Eligible employees

- Employees that can be furloughed:
 - Full-time employees
 - Part-time employees
 - Employees on agency contracts
 - Employees transferred under TUPE
 - Apprentices
 - Employees on flexible or zero-hour contracts
 - Shielding employees and those with caring responsibilities
 - Foreign nationals and “limb (b)” workers
 - Salaried company directors and salaried members of LLPs
- What about employees on long term sick leave, employees on maternity leave and employees who had resigned and are working their notice/on garden leave?



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What process do we need to follow to furlough employees?

Identify employees that you wish to furlough. They must have been on the company PAYE payroll and notified to HMRC on an RTI submission **on or before 19 March 2020**.



Employers must **obtain agreement** from the staff they wish to furlough. If sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes.



Employers must **provide confirmation in writing** to the employees who are being furloughed. A record of this must be kept for 5 years.



In order to make the claim, employers will need to calculate the amount they are claiming. Agents authorised to act for PAYE purposes will be able to make the claim on the employer's behalf.

Can we lawfully reduce salaries?

YES but... a reduction in employee salary amounts to a change to the terms and conditions of employment. Employers cannot make unilateral changes to the terms and conditions of employment unless there is contractual right to do so.

In the absence of a contractual right, employee **consent** is required to change the terms and conditions of employment.

- Express consent
- Implied consent
- Impose change
- Dismiss and re-engage



How can we manage staff holidays and requests to cancel or carry over?

In what circumstances can leave be carried?

- The Working Time (Coronavirus) Amendment Regulations 2020 amend the Working Time Regulations 1998 to permit the carry-over of any untaken Working Time Directive leave where it was not reasonably practicable to take it in the leave year “as a result of the effects of the coronavirus (including on the worker, the employer or the wider economy or society)”.

When must carried-over leave be used?

- Carried-over leave may be taken in the two leave years immediately following the leave year in respect of which it was due. Employers will only be able to require a worker not to take carried-over leave on particular days (as permitted under the Working Time Regulations) where they have a “good reason” to do so; this is undefined.

What happens on termination of employment?

- The Working Time Regulations are also amended to ensure a worker will be paid in lieu of any untaken carried-over holiday where their employment is terminated before they have had a chance to take it.

Reasonably practicable

An employee is self-isolating and too sick to take holiday

An employee is on furlough?

An employee has been required to continue working and cannot take holiday

An employee doesn't want to take the holiday because they can't go abroad?



Annual leave – Practical considerations

Leave type

- New carry-over rules only apply to the four weeks' leave derived from the Working Time Directive. Employers will have to identify which leave type an employee has taken to date.

Self-isolation

- An employee with COVID-19 symptoms should be permitted to reschedule leave. The position is less clear where the employee is voluntarily isolating and has no symptoms.

Cancellation by employees

- Employers are not required to allow employees to change the date of pre-booked annual leave where the employee is not sick or self-isolating and is able to take the annual leave.

Cancellation by employer

- Employers can require workers not to take statutory leave on certain dates but where consent has already been given, contractual provisions and policies should be considered.

Re-booking

- Employees can only be required not to take COVID-19 related carried-over leave on particular days where the employer has a "good reason".

What happens if an employee wants to volunteer during furlough leave?

Emergency Volunteer Leave

- Two, three or four weeks' consecutive leave
- Employees need 'emergency volunteer certificate'
- Employees must give 3+ days' notice
- Protected from detriment and dismissal
- Government setting up compensation fund

How can we effectively monitor and manage employees who are working remotely?



Set clear expectations on working time requirements; consider regular virtual catch-up meetings or calls; managers need to be more accessible to teams; make allowances for personal commitments e.g. home schooling or caring for family members.

Consider wellness and health and safety issues (including potential stress risks from the lockdown).

Be clear when employees are required to be logged-on to a remote working system and whether they can work effectively through other means.

Check whether contractual provisions/policies allow for employee monitoring (monitoring systems for login data or emails); employers must be proportionate and respect privacy rights.

It may be appropriate to assess patterns of non-responsiveness (being mindful of other personal caring responsibilities in the current situation).

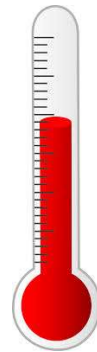
If intend to monitor productivity, expressly communicate (if not already in a policy) to staff that they will be monitored when working remotely for legitimate purposes.

Maintain employer's duty of trust and confidence – employees should not be unreasonably monitored; reasons should be documented; apply a consistent approach.

Can we perform health tests on our employees?

Can employers lawfully impose health screening

- Practically, the employer needs the agreement of the employee to conduct a test.
- Employers may be able to persuade reluctant employees by referring to: (i) an express contractual term in the employment contract; or (ii) exercise the right to impose a reasonable management instruction, the failure of which to comply being a disciplinary offence.
- Reasonable management instruction? Consider: (i) the employee's role; (ii) prevailing official health advice; (iii) the showing of symptoms; (iv) whether satisfactory alternatives to testing are available.
- Consider how invasive the testing is – temperature screening is less invasive than saliva/blood testing but not always accurate.



What you can do if someone refuses to be tested

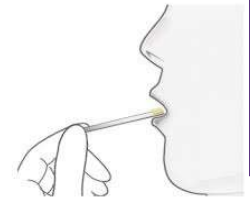
- Employers can send the employee home and require that the employee works remotely. If this is not possible, the employer will still be required to pay the employee unless the contract includes an express right to suspend without pay pending disciplinary action.



Can we perform health tests on our employees?

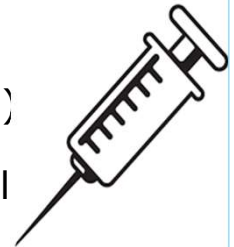
How any health screening would be administered

- Ideally all tests should be carried out by a third-party health company.
- Employees could be asked to conduct their own 'home tests' – risks of inaccuracy fraud.



Data privacy

- Health data is a special category of personal data under the GDPR.
- Employees should be informed about: (i) the purposes of the test; (ii) the lawful processing ground (i.e. protection of public health); (iii) the data being collected; (iv) with whom it will be shared; (v) for how long it will be retained; and (vi) if it will be transferred; (vii) how it will be kept secure; and (viii) the employee's rights to control how it is used.
- Data should be kept safe, secure and retained only for as long as necessary.
- If the employer intends to store the health results itself, a data protection impact assessment will be required.



What about migrant workers?

- The government has confirmed that employers are eligible to claim under the Coronavirus Job Retention Scheme for their foreign national employees.
- The government does not consider furlough payments to constitute 'access to public funds' which would breach the conditions of leave for the majority of UK visa holders.
- The Home Office has published some temporary guidance in light of COVID-19 and further guidance is anticipated.



Migrant workers sponsored under Tier 2 and 5 of the Points-Based-System

Employers that sponsor migrant workers under Tier 2 and 5 of the Points-Based-System are ordinarily required to comply with sponsorship duties and report certain changes in employment to the Home Office.

The Home Office have temporarily relaxed some of the sponsorship duties, including:

- sponsors are not required to report a change of work location for employees who are working from home due to COVID-19;
- sponsors are not required to withdraw sponsorship if they consider there are exceptional circumstances when an employee is absent from work without pay for four weeks or more;
- sponsors can temporarily reduce the pay of sponsored employees to 80% of their salary or £2,500 per month, whichever is the lower (provided this is part of a company-wide policy to avoid redundancies and in which all workers are treated the same); and
- start dates for new sponsored workers can be delayed by more than 28 days.

Other changes must still be reported using the sponsorship management system.

Temporary changes to right to work checks

All employers must complete a right to work check prior to an employee's start date and again prior to expiry if the employee has time-limited permission to work in the UK. Employers are required to verify an individual's **original** document to establish a statutory excuse against a civil penalty, if the individual is later discovered to be working illegally.

From 30 March 2020, employers can conduct the checks by video call without being in possession of the original document. The individual must submit a digital copy of their original documents via email to the employer. The individual must hold up their original documents during a video call so the employer can check these against the digital copy of the documents. Employers should record the date of the check and mark it as "adjusted check undertaken on [insert date] due to COVID-19".

Once the COVID-19 measures end, the previous requirements will resume with prior notice from the Home Office. The employer will then have eight weeks during which they must revalidate all right to work checks conducted under the relaxed requirements. Employers should see the original documents, check the validity in the presence of the employee, and take a copy which should be marked: "the individual's contract commenced on [insert date]. The prescribed right to work check was undertaken on [insert date] due to COVID-19."

If, at the point of carrying out the retrospective check, an employer finds that the employee does not have the right to work in the UK, they must end their employment.



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Can we delay or change bonuses?

Do employees have a contractual right to receive a bonus?

If yes, employees will need to consent to changes

Can the employer change the payment date or performance targets?

Potential legal claims: breach of contract or constructive unfair dismissal

Bonuses – Practical considerations

Timing

- Consider delaying date of payment
- Are there any contractual restrictions on timing?

Employees

- Delaying grants or bonus payments may de-motivate employees
- Employers should carefully craft employee communications

Setting targets

- Consider delaying setting future performance targets until the market is less volatile

Existing targets

- Consider adjusting targets in light of the impact of COVID-19
- Are there any contractual restrictions on target adjustments?

Flexibility

- Bonus schemes should be discretionary and retain flexibility for employer
- Consider updating contractual terms to increase flexibility in the future

What will change for employees when the lockdown ends?

When the government begins to reduce lockdown measures, businesses will need to consider re-opening and introducing employees back into the workplace.

Re-opening the business premises.

- Must comply with government requirements and guidance.
- Social distancing measures (advised even if not legally required to protect employees and reduce employer liability upon re-opening).
- Consider practical issues such as security/IT access.

Who can come back into work?

- Personnel with pre-existing or underlying health conditions?
- One size fits all broad policies are not advised.
- Consider who can return to work on an individualised basis and try to accommodate concerns and WFH requests wherever possible.

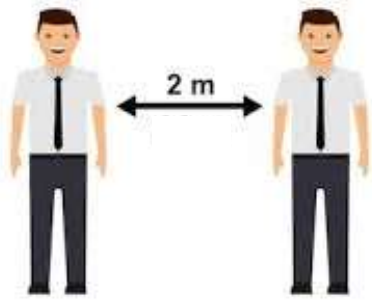
What will change for employees when the lockdown ends?

Review new and existing policies

- Employers are advised to have a policy in place that sets out measures being taken to mitigate the spread of COVID-19 in the workplace and distribute it to returning employees.
- Furlough leave policy.
- Existing leave policies.
- Benefits policy.
- Wage and Compensation Plans.



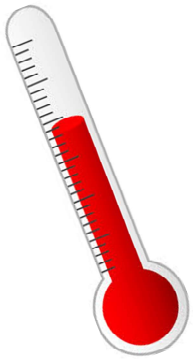
End of lockdown - Practical considerations



Physical workspace modifications

Limiting in-person interactions and physical contact

Training employees on social distancing policies



Screening employees

Personal Protective Equipment

Keeping the workplace clean



Presenters

Please do not hesitate to contact any of our presenters directly regarding any of the issues discussed today. Contact details are provided on the following slides.

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As practice group leader for Morgan Lewis’s labor and employment practice in London, Matthew Howse represents clients in the financial services, media, legal, and insurance industries in High Court and employment tribunal litigation and in class actions, collective actions, and group litigation. His experience includes employment law as well as privacy and cybersecurity law. In addition to litigating both contentious and non contentious issues, Matthew provides strategic employment law advice and counsels clients on the employment law aspects of transactions.

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Pulina Whitaker's practice encompasses both labor and employment matters as well as data privacy and cybersecurity. She manages employment and data privacy issues in sales and acquisitions, commercial outsourcings, and restructurings. Pulina provides day-to-day advisory support for multinationals on all employment issues, including the UK's Modern Slavery Act and gender pay reporting requirements. She also advises on the full spectrum of data privacy issues, including compliance with the General Data Protection Regulation.

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Louise Skinner provides sophisticated, strategic advice on all aspects of employment law, with particular focus on regulatory employment matters. Described as “truly exceptional and insightful” by clients in The Legal 500 UK guide, Louise advises on issues including investigations, contractual disputes, whistleblowing, discrimination and restraint of trade. Louise has particular experience in the financial services, life sciences, and sports, media and entertainment sectors.

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Lee Harding has a broad and versatile practice that goes beyond the provision of traditional legal services. Lee's practice is focused on the myriad legal implications arising out of a rapidly changing workplace: flexible working, five generations in the workplace, giving workers a voice, and the crossover between employment and the regulatory environment, to name but a few. The nontraditional legal services that Lee offers require a proactive approach to managing workplace issues before they escalate. He engages with a wide range of stakeholders to deliver sophisticated and actionable solutions that resonate across the entire business.

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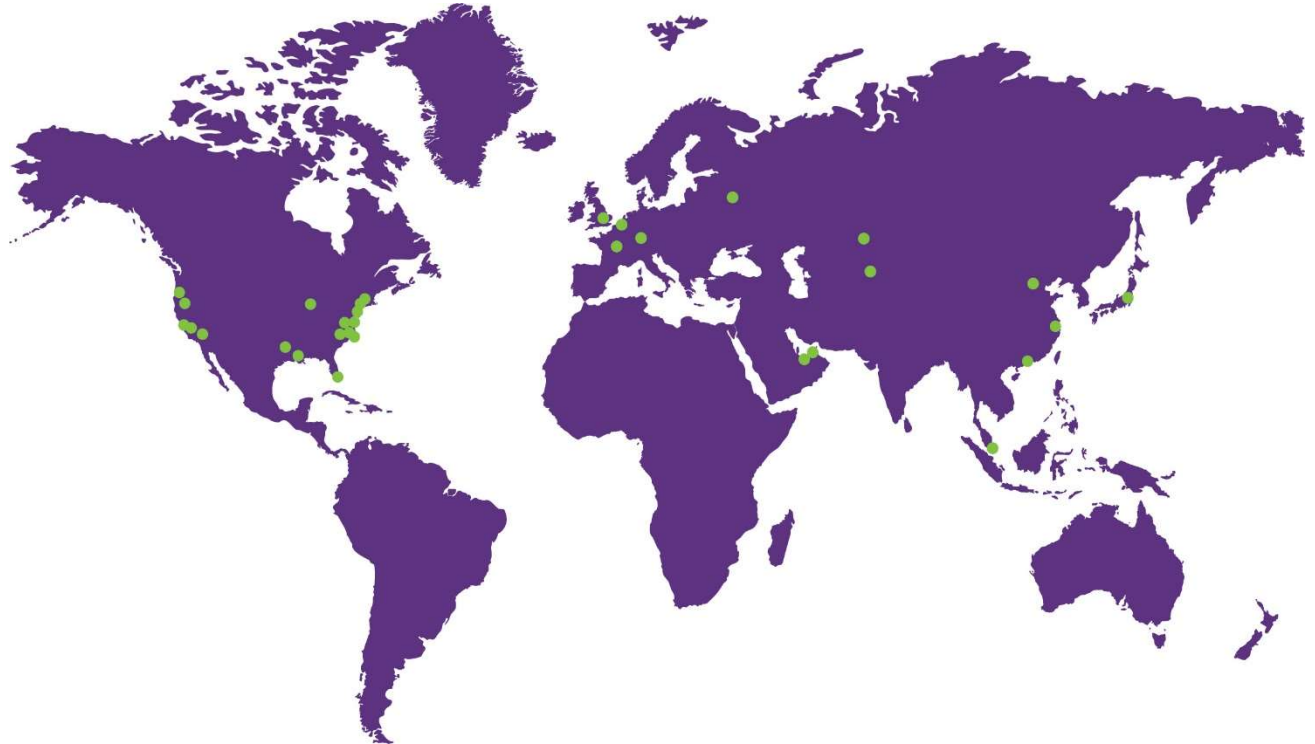
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