

COVID-19: Options Open to UK Employers

18 March 2020

UK employers of all sizes are facing unprecedented human resource challenges in the face of the COVID-19 pandemic. There is no one-size-fits-all approach, but the immediate and unexpected deterioration in economic conditions and potential incapacity (as a result of illness or self-isolation) of a sizable portion of the workforce are causing many employers to consider their long- and short-term options. We consider some of these below.

Home Working. Many employers are recommending that employees work from home where it is feasible for them to do so given the nature of their roles. Under the circumstances, opposition from employees to this development is likely to be very rare, and there are good arguments that it would be a lawful instruction under the current circumstances to require employees to work from home, unless there is good reason why this is not possible. Employers must comply with their obligations to ensure a safe place of work and a safe system of work. For employees who are working from home on a computer or laptop that can be done reasonably easily by asking the employee some basic questions. More in-depth assessment may be required for employees with disabilities, with appropriate adjustments where necessary. Employers would ordinarily be responsible for the cost of any extra equipment required, which will form part of the commercial considerations of the employer in deciding what approach to take. Not all employees can carry out their roles from home, of course. An employee working under a contract with regular hours, who is ready and willing to work, is entitled to be paid, even if the employer has no work for them.

Having a substantial number of employees working from home also presents other issues. Companies need to be sure that they can handle the remote capacity expected from new remote work arrangements and anticipate the additional burdens on IT staff and provide support as needed. Working outside the office may mean that trade secrets or sensitive business information have travelled outside the office. Employers should make sure that employees are aware of company policies on confidential information and information security and, in particular, are aware of how those policies play out in a remote work setting. All of these issues need careful handling, balancing the objectives

of business continuity with maintaining the health and stability of the workforce and ensuring business protection.

Lay-off and Short-time Working. For UK employers, temporary lay-offs or short-time working might be options. These are different options aimed at addressing a short-term drop in the need for employees. A lay-off is a period where the employee is required not to work at all and is not paid for that period. Short-time working is where an employee is required to work less than 50% of normal hours and is paid for the hours worked. These are options only open to an employer on a compulsory basis where there is a specific provision in an employee's contract of employment or a collective agreement relevant to an employee. For many years, such provisions were very unusual, but they became more common again after the 2008 financial crisis. Lay-offs may need to be considered where there is a downturn in work meaning that, for a temporary period, fewer employees are required, or where there is a temporary closure of the workplace due to insufficient employees being able to work. Short-time working arrangements may need to be considered where there is a downturn in work meaning that, for a temporary period, the business needs employees to work some but not all of their contracted hours. Employees who are already unable to work, for example due to sickness, cannot be laid-off or placed on short-time working. An employer's ability to impose lay-offs or short-time working may also be affected by the terms of collective agreements. Consultation with employee representatives or trade unions may also be required or, depending on the industrial conditions, desirable.

If employees are laid-off or placed on short-time working for at least four weeks or six weeks in a rolling 13-week period, there is a detailed procedure under the Employment Rights Act 1996 under which they can treat themselves as dismissed due to redundancy and claim a statutory redundancy payment.

Although no announcement has been made or indicated, it is possible that, given the unprecedented circumstances, the UK government will consider introducing a new statutory right for employers to lay-off employees or put them on short-time working.

The impact of any short-term measures on employees on sponsored work visas should be considered before implementation.

Voluntary Measures. In the aftermath of the 2008 financial crisis, some employers agreed voluntary measures with their workforce, or parts of it, to mitigate the financial impact of the economic downturn on businesses without requiring compulsory redundancies. Such measures included agreed periods of unpaid leave, in some cases combined with one-off financial incentives. It may be appropriate for employers to consider similar measures in the current circumstances. Employees can also be encouraged to use annual leave.

Redundancy. It is inevitable that some employers will need to make permanent reductions in their workforce. In the UK, where redundancies affecting 20 or more employees in the same establishment within a 90-day period are proposed, a consultation with employee representatives must be carried out for at least 30 days. This period rises to 45 days where 100 or more employees are affected. An exemption applies where there are special circumstances rendering it not reasonably practicable to consult for that period. A sudden and unexpected crisis such as that faced by many businesses in the light of the pandemic might, at least for a short period, be considered special circumstances. Where the exemption applies, the employer must still take reasonable steps to consult.

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Please do not hesitate to contact us with any questions.

LONDON



David Innes
dinnes@debevoise.com



Christopher Garrett
cgarrett@debevoise.com