

Coming Out of Lockdown – Employment Considerations: What to Expect in This Next Phase of “Business Unusual”

May 7, 2020

The UK government is considering relaxing its lockdown restrictions, and our clients are starting to model what a return to the workplace may look like. Katten has set out some of the common questions we have been getting, and the employment law considerations, in case of use. Please do not hesitate to get in touch if you have any questions.

1. How to Come Off Furlough?

An agreement was needed from an employee to cease all work in relation to their employment and put them on furlough in the first place. Logically, an agreement ought to be needed in reverse (i.e., for the employee to come off furlough and to commence work again). However, pending clarification from the government on this, this would lead to practical problems if employees refused to come back to work.

We anticipate, therefore, that employers will simply need to notify employees in writing that the period of furlough has ended (and no prior notice is currently required to end a furlough period). Consideration should be given by employers to individual circumstances such as child caring responsibilities or employees who may be living with someone who is shielding. The terms of the furlough letters should also be checked to see what the employer has already agreed as regards how the furlough period will be ended.

2. What Rates of Pay?

A large number of employers have implemented a pay reduction for furloughed staff (e.g., to 80% or to £2,500 per month, in line with what they can claim back under the Coronavirus Job Retention Scheme (CJRS or the “scheme”)). When employees are off furlough, it may be that the employer does not need them back full-time in the first month or so. Consideration should therefore be given to what pay terms should apply on the resumption of work.

Remember that any changes in pay — positive or negative — requires an employee’s consent, and the pay cut (if any) which had been implemented during the furlough period will likely only apply during the period of furlough, and not when the employee returns to work (again, employers should check the terms of the furlough letter on this).

3. Are There Health and Safety Considerations?

We anticipate that the government guidance will likely to continue to state that after lockdown has ended, if employees can work from home, they should continue to do so. In order to encourage employees to come back into the office, employers should comply as best they can with the advice produced by the Health and Safety Executive (HSE) (available [here](#)) regarding requirements in the workplace.

4. What If Employees Refuse to Come to Work?

We anticipate that some employees may refuse or feel anxious about coming into work. If they can’t work from home and they refuse to come to work and/or refuse to follow social distancing rules at work, employers would need to consider the specific reason that the employee is concerned about, and whether it would be discriminatory to (1)

refuse home working; (2) take disciplinary action; or (3) withhold pay in light of the employee's refusal. In any event, employers should consider whether reasonable adjustments are appropriate or realistic, such as providing private travel arrangements to avoid public transport, to address any concerns that employees may have.

If there is no discrimination, and the HSE advice is that the employee could reasonably be asked to continue to attend work, then it is possible that the employee could be investigated for misconduct in terms of their refusal to follow a reasonable management instruction, and their unauthorised absence. If the absence is unauthorised, then the employee would likely not be entitled to pay as they are not willing to attend work.

The context of the refusal to attend work and/or adhere to government guidance would need to be closely considered. If an employee were refusing to attend work because they believed that they were in serious and imminent danger and they could not reasonably have been expected to avert that danger, their dismissal for refusing to attend work could be automatically unfair. It is also possible that a complaint that the workplace is unsafe could amount to whistleblowing and so the employee would be protected against detriment and dismissal on grounds of that disclosure.

5. Are There Collective Redundancies?

As social distancing is likely to continue and the need for a full workforce may have declined for the foreseeable future, large employers should note the importance of 15 May 2020. As it stands, the CJRS runs until 30 June, so employers may want to start the difficult process of collective consultation on redundancies as soon as possible, in order to continue to be able to claim under the scheme for the reimbursement of wages of furloughed staff. Furloughed employees can be made redundant, and there is no current need to bring them off furlough before commencing redundancy consultation. Consultation takes 45 days for 100 proposed redundancies or more, or 30 days for between 20-99 proposed redundancies. If elected employee representatives are not already in place, then time (a week or two) to elect them should also be factored into the timetable, before any consultation can begin.

How you count the number of proposed dismissals depends on whether the employees are assigned to "one establishment". This is very fact specific but can mean individual stores, global teams or specific offices are one establishment, if the employees only work in that unit or team and do not have cross over with other parts of the business.

6. Notice on Full Pay?

Notice rules are complex and each individual employment contract will need to be reviewed. Notice pay (i.e., whether you can pay notice at the reduced furlough rate or at full salary rate) will depend on whether the employer is required to give only statutory notice, or at least a week more than statutory notice, and whether the employee has normal working hours or not.

Under the CJRS guidance, there does not appear to be any mechanism for employers who dismiss and pay in lieu of notice to reclaim payments in lieu of notice (PILON payments) under the CJRS. It may, therefore, be preferable for employers to keep employees on furlough for their notice period so that at least part of their notice pay can be recovered. For now, it would appear that notice pay is recoverable (pending any change in guidance from the government on this).

CONTACTS

For more information, contact your Katten lawyer or any of the following:



Christopher Hitchins

+44 (0) 20 7776 7663

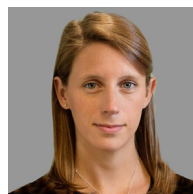
christopher.hitchins@katten.co.uk



Brigitte Weaver

+44 (0) 20 7770 5235

brigitte.weaver@katten.co.uk



Emma Phillpot

+44 (0) 20 7776 7657

emma.phillpot@katten.co.uk

Katten

katten.com

Paternoster House, 65 St Paul's Churchyard • London EC4M 8AB

+44 (0) 20 7776 7620 tel • +44 (0) 20 7776 7621 fax

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