

## Coming Out of Lockdown – Employment Considerations for UK Offices: What to Expect in This Next Phase of “Business as Unusual”

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The United Kingdom (UK) government is relaxing its lockdown restrictions, and our clients are starting to model what a return to the workplace may look like. In this advisory, Katten provides answers to 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.

### What do employers need to do to end furlough?

Employers can bring employees off furlough straight away on written notice (or whatever length of notice is set out in their original furlough letter). In practice, it would be advisable to give them “reasonable notice” to return to work if a notice period is not specified in the furlough letter. Reasonable notice might only need to be a few days, for example, to allow employees to organise travel and childcare. Also, employers will need to ensure that the place of work is “COVID-19 secure”. To do so, employers must carry out a COVID-19 Secure Risk Assessment in consultation with employees (see our previous advice on health and safety by clicking the link [here](#)).

Remember to ensure that you select employees to return to work on a fair basis to avoid any allegations of discrimination. Remember also you need to keep furlough records (for five years) in case Her Majesty’s Revenue and Customs (HMRC) needs to audit your business.

### The “Flexible Furlough” scheme

The government has announced that the Furlough scheme will close to new entrants from 10 June. The guidance is not yet clear on this, but it seems to be that the furlough scheme will include all employees who have previously been furloughed with that employer, even if they are working on 30 June (for example, on a staff furlough rotation). Flexible furlough will begin from 1 July, which will allow employees to go back to work part-time.

The government reimbursement will start to taper from August, when employers will have to pay employer pension and NICs contributions for furloughed employees. Government reimbursement will then decrease to 70 percent in September and 60 percent in October, with employers obliged to top up salaries to 80 percent at all times. Please see further details on the flexible furlough scheme [here](#).

### What amount can be claimed for an employee on flexible furlough?

Employers must report hours worked and the usual hours an employee would be expected to work in a claim period. For example, an employee normally works 40 hours a week and will return to work for 20 hours a week.

- If the employee normally earns £3,000 a month, he/she would have been receiving full furlough pay of £2,400 a month.
  - On returning to work 20 hours a week, the employee would receive £1,500 a month gross from his/her employer, plus £1,200 for the 20 weekly hours of furlough (half the monthly furlough pay).
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- This means the employee would get a total of £2,700 a month gross for working 20 hours compared to £300 less, if they were on furlough full time.

### **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 Health and Safety Executive 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.

### **Can employers ask employees to sign a waiver?**

We have seen employers in other jurisdictions, specifically in the US, asking employees to sign waivers excluding liability upon returning to work. Such waivers are less common in the UK, but many business are looking to have a global approach. Please get in touch for specific advice on this.

### **What about working remotely?**

Employers have a duty of care to employees who are working from home. But what about employees who are asking to work from aboard during the pandemic? There are many considerations, including insurance risks, triggering additional tax liabilities in another jurisdiction for the employee and the employer, as well as the potential for employees to acquire local law employment rights. It's not as simple as "working from home" in another country!

### **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 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 Coronavirus Job Retention Scheme. 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).

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## CONTACTS

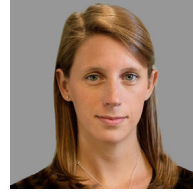
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