

Employment Essentials for In-House Lawyers – your questions answered

Here we answer all the questions our viewers asked before and during our webinar on 23rd June.

Q: How much notice do I have to give employees if I want them to go on, or come off, furlough?

A: Helen Cairns-Terry: There is no set or minimum amount of notice that you have to give someone but the ACAS guidance suggests that you talk to workers as soon as possible. Obviously plans are changing and developing so that might be many days ahead, but as soon as you have plans, just try to speak to them and encourage them to raise any problems or concerns they are going to have in returning to work. With schools being shut, they might have struggles with child care, or they might have someone very vulnerable in their family who is shielding for example. So just encourage them to raise any concerns – it is all about communication and keeping those channels open.

Q: What is the furlough percentage for July and August? If I want to terminate employment, I want to do that in the kindest way possible.

A: Helen Cairns-Terry: In July it is the same as it has been previously, so you can claim from the grant scheme as before. August is the first time when employers are going to have to pay something, but that is limited to pensions and employer's NICs. It gradually increases from then.

A: Michael Stokes: One point to add is that this is a short-lived and complicated period when employers can have some money from the government. If everyone using the furlough scheme at the moment was just working out when and how to make people redundant, they would be fine with that because they are used to doing those sums. The only complication is that someone is giving employers some money, partially to fund all those people.

One of the general points I make about the furlough scheme is that it's just a grant application - that is all. It is not new law, it never has been. It enables you to claim some money, so if you are making plans for making people redundant over the next four months, all you are doing is checking how much of that money you can have from Rishi Sunak.

Q: Can I decide that I need to reduce all my employees' wages by a percentage because of the impact Covid-19 has had because I believe that the business is in jeopardy?

A: Michael Stokes: Yes. That comes under my category of 'saving the farm'. Forget Covid-19 and go back five years. If all your orders fell off a cliff and you could not see where the next sale was coming from, then certainly as an employer, you know straight away that you are going to have to do something about it.

The remedies then open to employers are to cut terms and conditions or cut headcount, or both. When an employer needs to make those changes, there are ways in which they can do that. They need to seek agreement and consult before making irrevocable decisions so as to be fair if there have to be terminations. That is always a bit complicated but it is not that complicated.

I have seen a few recessions of different kinds – this is the most obvious reason for making a headcount reduction or changing people’s terms and conditions that I have come across. So that is one tick in the box if you are up in front of a tribunal; you are not going to have to persuade anyone that your business was have a bit of trouble during a pandemic when no one could leave their homes for weeks.

Q: How did the guidance on furlough end up on the questions of holidays and holiday pay?

A: Helen Cairns-Terry: In terms of holidays, I mentioned this earlier – people can take holiday when on furlough but they have to be paid at 100% of their salary, so you as an employer must top it up to 100%.

A: Michael Stokes: It is under the ‘not new law’ heading – when everyone was examining every version of the guidance on furlough as they came out, they were looking for golden rules on holiday. People did not even know at the beginning whether it was possible to be on furlough and be on holiday at the same time – we were worried for a few months, as Bank Holidays or Easter loomed that if someone was on holiday for Easter that would interrupt the furlough period and wreck the grant application.

Some issues fell away and got sorted out, but one that never got sorted out was this issue of forcing someone to take holiday when they don’t want to during furlough and it is not a new problem. It has existed since the working time regulations came in in 1998 when employers were given the right to give notice to employees to take holiday as long as they gave them the right amount of notice. They could make them take a day off as a health and safety measure effectively. It hardly ever happens because, as we know, you usually agree your holiday, it is usually scheduled – Bank Holidays, summer shutdown, Christmas shutdown – you book it with your boss; I can think of no case law on it at all.

When furlough came in and people were stuck in their 15th floor flat with 10 dogs and five children running around, the issue came up around where, in EU law, that health and safety measure of being able to take paid holiday to rest and recuperate could possibly be satisfied when you were imprisoned with all those maniacs in your tiny flat! How could that be a health and safety related break from work that it was meant to be under the Working Time Directive (WTD)?

If you look at the most recent government guidance, specifically on holidays and furlough, you will see that they raise the question but don’t answer it because they don’t have to. One day, someone will run that argument that an employer making someone take a holiday when they are furloughed in very difficult circumstances, where they can’t just enjoy themselves and relax and rest from work, was not actually giving them holiday, so the employer would be in breach of their duties under the WTD.

Answered by:

Helen Cairns-Terry, Associate, Employment and Immigration
M: 07525 594 650
E: hcterry@hcrlaw.com

Michael Stokes, Partner, Head of Employment and Immigration
M: 07807 747 455
E: mstokes@hcrlaw.com