

U.K. EMPLOYMENT LAW CONSIDERATIONS FOR COMPANIES RESPONDING TO COVID-19 - UPDATE

To Our Clients and Friends:

In this alert we summarise key developments in UK employment law over the past week in response to the novel coronavirus (COVID-19). The UK government response to the outbreak evolves daily, and we encourage employers in the UK to monitor UK government and National Health Service guidance and legislative developments over the coming days and weeks.

In our alert of *17 March 2020*, we identified some of the key considerations for UK-based businesses working to reduce the risk of employee exposure. We also outlined key steps to take when an employee tests positive for COVID-19 or must care for someone with the virus. In our alert of *20 March 2020*, we summarised the UK government's Coronavirus Job Retention Scheme which will remain in place for a minimum of three months, covering wages backdated, from 1 March 2020.

Further clarity on Coronavirus Job Retention Scheme

The UK government has provided further practical guidance in relation to the Coronavirus Job Retention Scheme. This guidance states that employers can use a portal to claim for 80% of furloughed employees' usual monthly wage costs, up to £2,500 a month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions. Employees hired after 28 February 2020 cannot be furloughed in accordance with this scheme. Further, in order to qualify for the payment, an employee must be furloughed for a minimum period of three weeks.

The guidance states that employees must be paid the lower of 80% of their regular wage or £2,500 a month, and employers can choose to "top up" the pay of a furloughed employee to 100% of their contractual pay, but are not obliged to under the scheme.

Separate guidance to employees indicates that employers will "discuss" with employees placing them on furlough, then accessing the scheme. This calls into question whether an employer can unilaterally place employees on furlough and reduce pay to the amount recoverable by way of grant. Employers should therefore seek to agree with employees their placement onto, and how they will be paid during, furlough. In the absence of agreement, an employer may be forced to make those employees, who would otherwise be furloughed, redundant instead.

Emergency Volunteering Leave

The Coronavirus Act 2020 contains a new statutory right for workers to take emergency volunteering leave ("EVL") in blocks of two, three or four weeks during government-designated "volunteering

GIBSON DUNN

periods”. The initial volunteering period will be 16 weeks beginning on the day the legislation comes into force, which will be achieved by regulations made by a government Minister. EVL will be unpaid, but a UK-wide compensation fund will compensate volunteers for loss of earnings, travel and subsistence.

To take EVL, the worker must give their employer three working days' notice and produce a certificate confirming that they have been approved as an emergency volunteer by a local authority, the NHS Commissioning Board or the Department of Health. Employers cannot refuse EVL; however, certain workers will be ineligible (for example, workers engaged by businesses with fewer than 10 staff and employees in the police service). Employees taking EVL remain entitled to all employee benefits other than remuneration and will be entitled to return from leave into their former job on terms and conditions which are no less favourable than those which applied before leave commenced.

Proposed Protection for Self-Employed and Freelancers

In a television address on 26 March 2020, the UK government has outlined details of new Self-Employment Income Support Scheme. The scheme will pay self-employed people a taxable grant worth 80% of average monthly income taken over the last three years, capped at £2,500 per month. The scheme is only open to anyone with trading profits less than £50,000 and to those who earn the majority of their income from self-employment. The scheme is unlikely to be up and running before the start of June 2020, so it will not help self-employed individuals with immediate cash flow issues. Unlike the Coronavirus Job Retention Scheme, an eligible self-employed person can continue to work while claiming the grant.

Travelling To and From Work During the Lockdown

In a television address on 23 March 2020, Prime Minister Boris Johnson announced a minimum three-week lockdown in the UK to curb the spread of COVID-19. Government guidance states that it is important for business to carry on where possible, with the exception of certain non-essential businesses. The vast majority of individuals should be able to work from home and employers should take every step to facilitate employees to do so.

Guidance has confirmed that individuals should only be travelling to a workplace if the work cannot be done at home, provided that individuals are well and neither the individual nor any of their household are self-isolating, and if the workplace is permitted to remain open. Cabinet Office guidance which is somewhat ambiguous suggests that “Businesses that continue to contravene the measures will be forced to close down.” It is not clear whether this statement is intended to refer only to those businesses which have been ordered to close, or extends to cover businesses that require people to attend the workplace unnecessarily.

Managing vacation

Employees in the UK are entitled to a minimum of 5.6 weeks paid vacation, to be taken in each holiday year. Many employees have seen their usual vacation plans disrupted by the COVID-19 pandemic and associated travel restrictions. As a consequence, many employees are not utilizing their annual vacation

allowance as they usually would. Left unchecked, UK employers may face unmanageable requests from employees wishing to take substantial periods of paid vacation once the current restrictions have been lifted, and at a time when businesses are seeking to recover from the crisis. In order to avoid this situation, employers may wish to agree and, if necessary and appropriate, require employees who are not being furloughed to take periods of paid vacation before the restrictions are lifted. At the time of publication, it has been announced that the Government will bring out regulations to allow up to 4 weeks of unused holiday to be carried over into the next two leave years if it has not all been taken due to COVID-19.

Off-payroll Working Rules Change Postponed to April 2021

We have reported previously on changes proposed to UK legislation known as IR35 which governs the payroll tax arrangements for certain individuals who supply services through an intermediary, usually a personal service company (“PSC”). These changes, which were due to take place in April 2020, have now been postponed until April 2021 in recognition of the disruption caused by the COVID-19 outbreak.

Gender Pay Gap Reporting Suspended for April 2020

The Government Equalities Office and the Equality and Human Rights Commission (EHRC) has announced the suspension of the enforcement of the gender pay gap deadlines for this reporting year, which had required reporting of organisations’ April 2019 data by 4 April 2020.



Gibson Dunn attorneys regularly counsel clients on the compliance issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please contact the Gibson Dunn attorney with whom you work in the Employment Group, or the following members of the UK employment team:

James Cox – London (+44 (0)20 7071 4250, jcox@gibsondunn.com)

Sarika Rabheru – London (+44 (0) 20 7071 4267, srabheru@gibsondunn.com)

Heather Gibbons – London (+44 (0)20 7071 4127, hgibbons@gibsondunn.com)

Georgia Derbyshire – London (+44 (0)20 7071 4013, gderbyshire@gibsondunn.com)

Charlotte Fuscone – London (+44 (0)20 7071 4036, cfuscone@gibsondunn.com)

GIBSON DUNN

© 2020 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.