

## **U.K. EMPLOYMENT LAW CONSIDERATIONS FOR COMPANIES RESPONDING TO COVID-19 AND PLANNING FOR A RETURN TO THE WORKPLACE**

To Our Clients and Friends:

On 10 May 2020, the UK government announced a provisional roadmap for the phased relaxation of the current COVID-19 lockdown restrictions, including those restrictions which have impacted businesses across the UK. While the UK government continues to require those who can work from home to do so, employees who are not able to work from home are now being actively encouraged to return to the workplace provided that their workplace is permitted to open and can be operated within government guidelines. In recent client alerts, we have considered in detail the law regarding: (i) the options for reducing the risk of employee exposure to COVID-19, including (a) instituting work-from-home/telecommuting policies and (b) instructing employees not to work; (ii) what to do if an employee tests positive or needs to care for an ill family member and (iii) the Coronavirus Job Retention Scheme (“CJRS”). Below, we identify some of the key considerations for UK-based businesses when taking steps to comply with their health and safety obligations once certain groups of employees return to the workplace. We also outline key amendments to the CJRS.

The UK government response to the outbreak continues to evolve daily, and we encourage employers in the UK to monitor UK government and National Health Service guidance and legislative developments over the coming weeks.

### **Return-To-Work, Screening, and Safety**

#### **New Government Guidance and Return to Work Plans**

On 11 May 2020, the UK government published both new and updated guidance to reflect the focus on getting workers back to work where possible. The guidance has been produced with the aim of helping employers ensure employees work safely during coronavirus, and includes measures to assist employers in making the workplace “COVID-19 secure”. The UK government has produced general guidance comprising of five key points, which we detail below, and eight workplace-specific [guidance notes](#), formulated with the objective of meeting these five key points. We are available to guide clients through the specific guidance applying to their industry.

## *Five Key Points in the COVID-19 Secure Guidance*

### *1. Work from home, if you can*

Individuals should work from home if they can, and “all reasonable steps” should be taken by employers to enable individuals to work from home. However, the guidance now clearly states that those who cannot work from home and whose workplaces are permitted to operate, should go to work.

To ensure readiness for staff returning to work, employers must devise a return to work plan with employees and those who represent them.

When devising a return to work plan, employers should consult employees, listen to their concerns and be mindful of their personal circumstances including childcare responsibilities. Employers should also think about identifying vulnerable employees and how they will be treated when the workplace reopens. If an employer requires certain roles or numbers of people to return, they should be mindful of how selection will be carried out to avoid any discrimination or other issues of unfairness which could lead to claims.

### *2. Carry out a COVID-19 risk assessment, in consultation with workers or trade unions*

Employers must carry out COVID-19 risk assessments in consultation with their trade unions or workers in order to establish what guidelines should be put in place, and identify sensible measures to control the risks in the workplace. Employers with over 50 employees should publish their workplace risk assessments on their website, with smaller employers being advised to do so. Employers should share the results of risk assessments with their workforce.

Once a risk assessment has been carried out, an employer should update appropriate policies and procedures accordingly.

Employers should also consider providing appropriate training for managers and employees and deliver this training before or upon their return to the workplace. Communications should be displayed around the workplace in prominent places such as handwashing points, entrances and exits. A downloadable notice is provided in each of the workplace-specific guidance documents. Employers should monitor the effectiveness of their policies and review their plans regularly, ideally each time the government updates its guidance.

### *3. Maintain two metres social distancing, wherever possible*

Employers may need to consider changing the layout of workspaces to maintain a two metre distance between individuals in compliance with social distancing advice. Employers should consider designating a one way system for entry and exit into the building; limiting the number of people allowed in confined spaces at any one time (e.g. lifts, meeting rooms, toilets); reducing face to face interactions, for example by introducing delivered desk-based lunch orders and restricting or prohibiting the use of communal areas such as kitchens and lunchrooms; encouraging non-public means of getting to work (e.g. bicycles or walking); and reducing non-essential work travel.

#### 4. *Where people cannot be 2 metres apart, manage transmission risk*

Employers are also encouraged to change the way work is organised in order to reduce the number of people with whom each employee interacts face to face as well as minimizing those interactions. Employers should consider limiting the number people in the workplace at any one time, by adjusting working hours or dividing employees into groups and rotating their attendance in the office, introducing protective screens into the workplace and encouraging video-conference meetings.

#### 5. *Reinforcing cleaning processes*

Workplaces should be cleaned more frequently than usual, focusing on high touch points like door handles or keyboards, ensuring access to hygiene facilities such as hand sanitizer, providing anti-bacterial wipes for equipment and disposing of waste frequently.

#### ***Risks of Failing to Implement the COVID-19 Secure Guidance***

Employers who fail to comply with the COVID-19 secure guidance may find themselves in breach of health and safety obligations towards workers and visitors to their premises. Such breaches may attract criminal penalties and/or enforcement notices. To encourage compliance with the COVID-19 secure guidance, the Prime Minister has asked employees to report their employers' failures to implement the guidance to the Health and Safety Executive (“HSE”), the organisation responsible for enforcing health and safety laws in the UK, and the UK government has made available up to an extra £14 million for the HSE for additional compliance-monitoring resources.

#### ***Screening Employees for COVID-19***

Employers who wish to carry out COVID-19 screening, such as temperature checks, on their employees, workers or visitors will need their consent to do so. The results of any screening would need to be handled appropriately in accordance with the GDPR and Data Protection Act 2018 to the extent that it is stored or processed: a data protection impact assessment is likely to be required and employers will need to ensure any individuals it screens are provided an appropriate privacy notice detailing what personal data will be required, how their personal data will be used, who it will be shared with, the implications of the results and how long it will be kept for. Employers should also ensure any screening is applied consistently across their workforce to mitigate any risk of discrimination claims, which could arise upon the screening of a specific group of employees perceived to be at a higher risk of having contracted the virus. Finally, employers should seek to adopt the least intrusive means of protecting the health and safety of their employees and making the workplace safe.

#### ***If Employees Become Ill***

Employers must follow government guidelines in respect of COVID-19 related illness. If anyone becomes unwell with a new, continuous cough or a high temperature, they should be advised to follow the stay at home guidance. If these symptoms develop whilst at work, the employee should be sent home immediately and advised not to use public transport if possible. Government policy currently states that

it is not necessary to close the business or workplace or send any staff home in these circumstances. Please refer to our [alert](#) of 17 March 2020 for sick pay implications.

## ***Employees who require shielding and those at high risk***

Employees who have been informed by their GP or an NHS letter that they are clinically extremely vulnerable, because for example they suffer from severe respiratory conditions or are undergoing immunosuppression therapies sufficient to significantly increase risk of infection, are required to shield i.e. stay at home at all times and avoid all non-essential face to face contact. Employers should support members of staff who are clinically extremely vulnerable, as well as individuals with whom they live, as they follow the recommendations set out in the shielding guidance. In particular, they should be supported to stay at home, until UK government guidance suggests otherwise.

Employees who are not clinically extremely vulnerable but have medical conditions which place them at an increased risk of severe illness from COVID-19, such as pregnant women and those with diabetes, have been advised to take particular care to minimise contact with others outside their households, but do not need to be shielded. Employers should listen to such employees' concerns and be flexible to their needs where practicable.

## ***Employees who are unable to return to the workplace due to childcare commitments***

The UK government's plan for a phased reopening of nurseries and schools is not due to begin until 1 June at the earliest, with only certain year groups eligible to return in the early stages. As such, some employees may be unable to return to the workplace due to childcare commitments. The Prime Minister has encouraged employers to regard childcare commitments as an obvious barrier to an employee's ability to return to the workplace. Employers should encourage open communication with employees with childcare commitments and endeavour to reach an agreement on flexible working arrangements where possible.

## ***If Employees Hesitate or Refuse to Return to Work***

Employees may also be reluctant to return to the workplace if they have to take public transport to get to work, if they do not feel the measures their employer has taken go far enough to ensure their health and safety, or if they live with a vulnerable person who requires shielding. Employers will have the best chance of identifying these issues at an early stage if they are able to engage in early consultation and ongoing communication with their employees.

If employees refuse to return to work, employers will need to consider whether they can be more flexible in the arrangements they have put in place taking into account the employees' circumstances, or whether ultimately they wish to take further steps to require their employees to comply with the instruction to return to work, or treat a refusal to return to work as an unauthorised absence and consider disciplinary action.

Employers will need to ensure any such steps are taken in a fair, rational and non-discriminatory way to avoid potential liability in this area. It would also be advisable for employers to record their decisions and steps they take to be flexible to the needs of their employees where appropriate or necessary.

## **Update: Coronavirus Job Retention Scheme**

**General:** We reported on the CJRS when it was first introduced in March 2020. On 12 May 2020, the Chancellor announced that the CJRS will be extended by a further four months until the end of October 2020, with no changes until the end of July 2020. From August 2020: (i) employees will be able to return to work on a part-time basis; (ii) employers will be required to pay a percentage towards the salaries of their furloughed employees and (iii) the employer's payments will substitute at least part of the government's contribution under the CJRS, ensuring that any furloughed workers continue to receive 80% of their salary (up to the maximum of £2,500 a month). From August 2020 employers will have to start sharing, with the UK government, the cost of paying people's furloughed salaries. The UK government has committed to provide further details before the end of May 2020.

**Holiday:** On 13 May 2020, the UK government published guidance on workers' entitlement to holiday, holiday pay and the right to carry over of holiday during coronavirus. The guidance confirms that furloughed workers continue to accrue holiday, including any contractual holiday they receive above the statutory minimum of 5.6 weeks (subject to any furlough agreement to the contrary), and may take holiday without it interrupting their period of furlough. It also confirms that a furloughed worker's entitlement to holiday pay remains unchanged and is to be calculated in the normal way. This means that where the calculated holiday pay rate is above the pay the worker receives whilst on furlough, the employer may continue to claim the 80% CJRS grant, but must pay the worker the difference unless they have agreed that the employee's pay is to be reduced to the furlough limit for the period of furlough. This applies to bank holidays where they fall within a worker's furlough period.

As reported in our alert of 27 March 2020, the UK government previously introduced the Working Time (Coronavirus) (Amendment) Regulations 2020 (the "**Regulations**") which 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. The latest guidance advises that when determining whether it was not reasonably practicable for a worker to take holiday, employers should consider various factors, including: (i) increased demand for the business' services due to COVID-19 that require the worker to continue working; (ii) the extent to which the business' workforce is disrupted by COVID-19 and the ability to provide temporary cover of essential activities including the availability of the remaining workforce to cover the worker whilst they are on holiday; (iii) the worker's health and the speed at which they need a period of rest and relaxation; (iv) the length of time left in the worker's holiday year to enable them to take holiday later in the year; and (v) the impact of the worker's holiday on society's response and recovery from COVID-19.

The guidance states that employers should do everything reasonably practicable to ensure workers take as much of their holiday in the year to which it relates and notes that furloughed workers will be unlikely to need to carry forward their holiday as they can take it during furlough.

# GIBSON DUNN

As reported in our alert of 27 March 2020, employers have the right to require workers to take or cancel holiday subject to providing a certain amount of notice, a right which continues to apply to furloughed workers under the latest guidance. This tool should assist employers in ensuring holiday is taken within the applicable year and also prevent employers facing unmanageable holiday requests from workers later in the year when restrictions are lifted. However, if an employer is unable to fund the difference between furlough pay and holiday pay, this may result in it not being reasonably practicable for the worker to take holiday whilst on furlough and enable them to carry their entitlement forward under the Regulations. Employers should also consider whether a worker's individual circumstances allow them to enjoy holiday whilst on furlough in the fundamental sense, taking into account any social distance or self-isolation restrictions they may be under which would prevent them from resting and relaxing, before requiring them to take holiday.



*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 authors:*

*James Cox – London (+44 (0)20 7071 4250, [jcox@gibsondunn.com](mailto:jcox@gibsondunn.com))*

*Sarika Rabheru – London (+44 (0) 20 7071 4267, [srabheru@gibsondunn.com](mailto:srabheru@gibsondunn.com))*

*Heather Gibbons – London (+44 (0)20 7071 4127, [hgibbons@gibsondunn.com](mailto:hgibbons@gibsondunn.com))*

*Georgia Derbyshire – London (+44 (0)20 7071 4013, [gderbyshire@gibsondunn.com](mailto:gderbyshire@gibsondunn.com))*

© 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.*