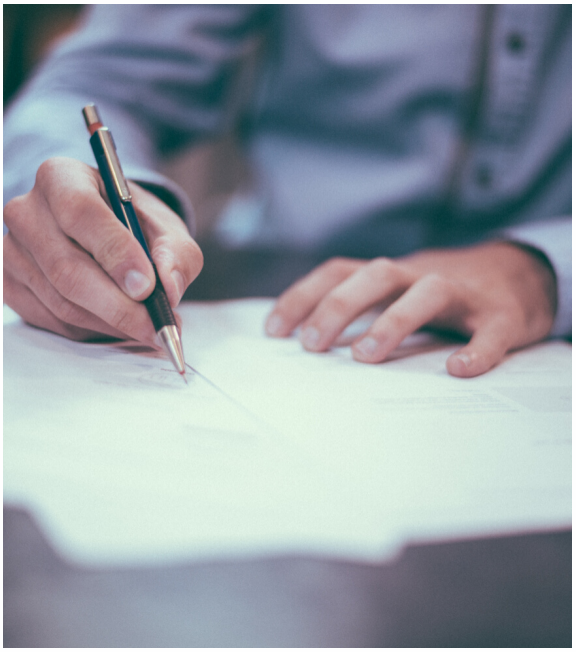
EMPLOYMENT LAW
NEWSLETTER

WELCOME

Well, what a few months it's been. It has been an uncertain and challenging time for all of us and for us employment lawyers, HR professionals and those running businesses it has certainly given us a lot to think about.

In what is the first in our series of quarterly employment law newsletters, we will discuss the F word - The relationship between Furlough and notice pay; flexible working; updates to termination payments; and returning to work, whether under the updated furlough scheme or not.

So, grab a coffee and enjoy the read.



THE RELATIONSHIP BETWEEN FURLOUGH AND NOTICE PAY

If an employee has agreed to a reduction in wages to 80% while on furlough and that employee is given notice of termination of their employment whilst on furlough, should notice pay be paid at 80% or 100%?

The short answer is that it depends and there is no straightforward answer as the Coronavirus Job Retention Scheme is silent on the topic. Excellent, we hear you sigh. But bear with us, we will do our best to keep this short and sweet.

The traditional approach would be to look closely at the terms of the contract of employment as this will determine whether the employee is entitled to minimum notice payments under the Employment Rights Act 1996. If the employee is entitled to at least one weeks' greater notice under their contract than the statutory minimum notice period, then the right to statutory minimum notice pay does not apply. Therefore, unless the Furlough agreement or contract of employment state otherwise, which is unlikely, then the employee is only entitled to the 80% pay during their notice period.

If the employee is entitled to statutory minimum notice only, then the employee has minimum notice pay rights. Statutory minimum notice pay calculation is based on a weeks' pay. So, if that employee has normal working hours and their weekly pay does not vary depending on how much work is done each week, then a weeks' pay for the purposes of statutory minimum notice pay is the amount of contractual pay due on the calculation date. The calculation date is the day before notice was given. Therefore, this is technically going to be their reduced salary under the furlough scheme.

For employees who have normal working hours but whose pay varies depending on the amount of work done, a weeks' pay is the average earnings over the 12 weeks before notice was given. Depending on when the individual was placed on furlough this may include some weeks of furlough pay and some of full pay. This calculation is also used for employees who do not have normal working hours. So, their notice pay will be on a sliding scale somewhere between 80% and 100%.

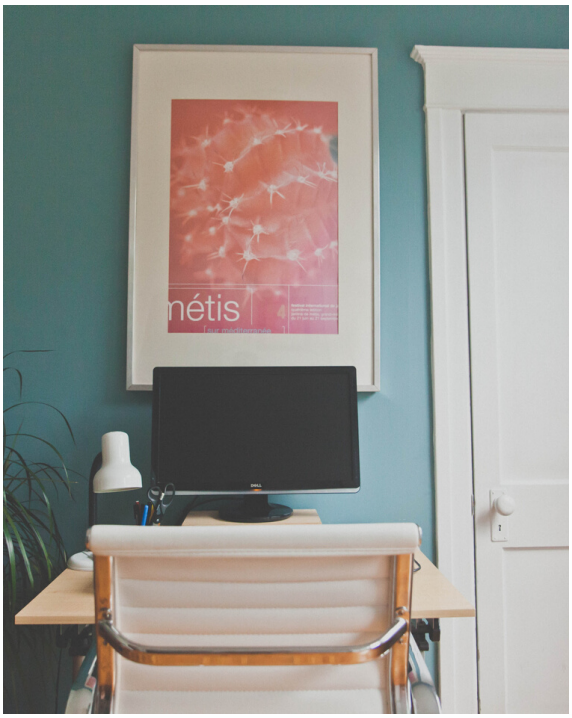
However, whether Tribunals will follow the traditional view is a different matter and is yet to be seen. They may well do. BUT, given the intention of the furlough scheme is to preserve jobs, it seems unlikely that Tribunals will allow employers to use the furlough scheme for employees whose jobs have been terminated by reason of redundancy or any other reason and may therefore take the view that employees are entitled to 100% pay during their notice period. This is a complex area of law and unchartered territory and therefore if employers are considering paying employees anything less than 100% of notice pay, please discuss the matter with us first!

TERMINATION PAYMENT UPDATE/SETTLEMENT OF CLAIMS VIA ACAS

Sticking with the theme of termination of employment, just a quick note on termination payments; The National Insurance Contributions (Termination Awards and Sporting Testimonials) Act 2019 provides that all termination payments over £30,000 are now subject to Class 1A employer National Insurance Contributions. This came into effect on 6 April 2020.

Also following the recent case of Duchy Farm Kennels v Steels[1], in the rare event you find yourself faced with actual or potential tribunal proceedings from a disgruntled employee and agree a settlement via ACAS, please speak with us first if you want any settlement to include confidentiality provisions. In this recent case a breach by the employee of the confidentiality provisions contained within the settlement terms with ACAS did not entitle the employer to withhold payment, all because of the wording used.

FLEXIBLE WORKING



As the Covid-19 pandemic hit, businesses nationwide suddenly had to adjust to a new way of working and for many, it opened eyes to how remote and flexible working can work in practice and that, in fact, this does carry some benefits with it. There is no doubt that as a result of this, businesses will work in new and dynamic ways going forward. Some large employers, such as Barclays and WPP have already announced that going forward it is likely that having thousands of employees in large London offices will be a thing of the past.

We can expect smaller employers to also follow suit. In addition to this, it is also likely that as people start to return to work, either under the updated furlough scheme or otherwise, employers will see a rise in flexible working requests. So we wanted to highlight a few of the key legal considerations around flexible working.

[1] [2020] EWHC 1208 (QB)

FLEXIBLE WORKING REQUESTS

Anyone who is an employee with 26 weeks continuous service has the right to make a flexible working request.[2] An employee can make a request to change their working terms if it relates to any of the following:

- A change to the hours they work
- A change to the times they are required to work
- A change to the place they work (as between their home and any of the employers work places)

This covers a wide range of working patterns including, flexi-time, part-time working, full-time working, homeworking, compressed hours, staggered hours, shift hours and self-rostering among others. It is also worth noting that the request does not have to be for a permanent change, it can be a request to change terms temporarily, although the request should specify the duration of the requested change.

In order to count as a flexible working request made under the statutory scheme, the employee must make the request in writing, state that it is a flexible working request made under the statutory procedure, specify the change they are seeking and when they wish for it to take effect, state what affect they believe the change would have on the business and state whether they have made a previous request, and if so, when. An eligible employee is entitled to make one request under the statutory procedure in a 12-month period.

If you receive a flexible working request under the statutory procedure you must do the following:

- Deal with the request in a reasonable manner. E.G Meet with the employee and discuss the request and the reasons for it.
- Deal with it within 3 months of receiving the request
- Only refuse it for one of the '8 business reasons' discussed below

[2] Under s.80F Employment Rights Act 1996 and the Flexible Working Regulations 2014

THE 8 BUSINESS REASONS FOR REFUSING A FLEXIBLE WORKING REQUEST

1. The burden of additional costs;
2. The detrimental ability to meet customer demand
3. Inability to reorganise work among existing staff
4. Inability to recruit additional staff
5. Detrimental impact on quality
6. Detrimental impact on performance
7. Insufficiency of work during proposed periods of work
8. Planned structural changes

It is important to remember that, albeit not a requirement, it is often a good idea to agree to the new working pattern on a trial basis. This is especially so if the request is to be refused.

If the request is accepted, then you must issue a 'section 4 statement' which is a written statement of the change to the employee's terms and conditions.

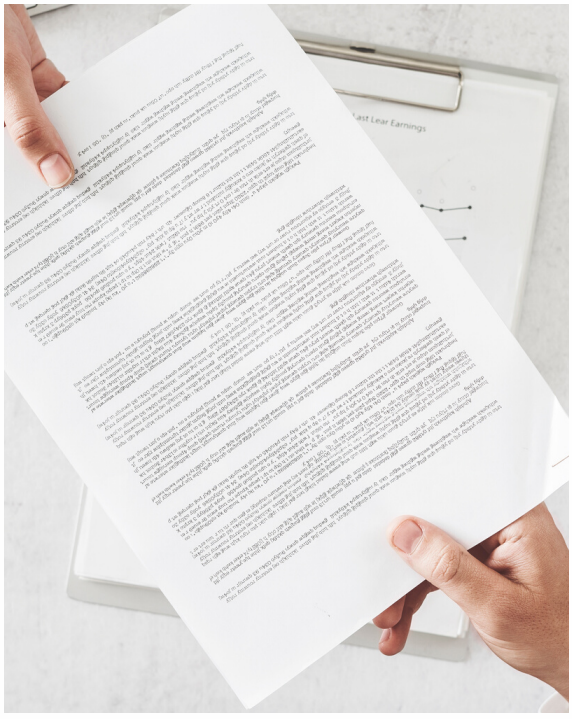
There is ACAS guidance on flexible working requests and should issues surrounding flexible working requests end up at the Employment Tribunal, the Tribunal will look whether the ACAS guidance has been followed.

We can of course provide any support or assistance needed when handling such requests, including template acknowledgement and response letters.

CHANGING TERMS OF EMPLOYMENT

If you as an employer wish to change the working pattern of employees in light of the "new normal" this will require you to amend the terms of their existing contract of employment.

You should do this by agreement and in writing. Please do contact us should you require assistance on this.



THE UPDATED FURLOUGH SCHEME

On the 20th May the Treasury rather sneakily issued a revised (second) version of a Direction first issued in April covering the furlough scheme. These directions have greater legal force than the guidance found on the Government website. What does this mean for us using the scheme you may ask?

Well assuming you have recorded all furlough arrangements with your staff in writing (and which was required both by the original direction and also to generally help protect you from disputes further down the line) there is now an obligation to keep these records until at least 30 June 2025. Such written records should also reflect the fact that you and your staff have agreed that they are not to undertake any work whilst on furlough. If you have not recorded anything in writing please get in touch!

The updated direction also clarifies that when calculating a staff member's regular pay account should be taken of non-discretionary overtime, commission or piece rates where received either in accordance with their employment contract or other legally enforceable agreement in place.

If you are looking to move an individual in receipt of SSP to furlough the updated Treasury Direction suggests it may now be possible for the employer and employee to agree when SSP will end and furlough start. However, please note we say "suggests" as this part of the Treasury could be worded more clearly. Indeed, the revised Direction still refers to the CJRS ending on 30th June which is no longer the case, so expect further revisions to follow in due course!

On Friday 29th of May Rishi Sunak gave some long-awaited details of the changes to the furlough scheme as we know it, albeit the Treasury Direction has not yet been updated so further details may emerge in due course. However, here's what we know so far:

- The first thing of importance to note is that the 10th of June is last date that somebody can be placed on furlough and the scheme will close to new entrants on the 30th June.
- On the 1st of July "Flexible Furlough" will be introduced which will allow employees to come back to work part-time and be furloughed part-time. It will be up to the employer to decide on how the time will be split.
- From the 1st August employers can no longer reclaim employer National Insurance and pension contributions through the CJRS.
- From the 1st of September, the Government's contribution will reduce to 70% of salary with a cap of £2,187.50.
- Employers are required to top up the difference to either the 80% or 100% of salary agreed in the furlough agreement.
- From the 1st of October, the government contribution will drop to 60% of salary, with a cap of £1875 and employers will continue having to top up the difference.
- The furlough scheme will end on the 31st of October 2020.

If you are planning to make use of "flexible furlough" from the 1st of July then consideration will need to be given to whether furlough agreements need to be amended. Should you require assistance with this please do not hesitate to get in touch.

As is the way with these things, the devil will no doubt be in the detail and therefore should further amendments be made once the Treasury Direction is updated we will of course, let you know!