Returning to Work Post-Shutdown, Part II: Addressing the Economic Impact of COVID-19

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In this second installment in our series examining the challenges U.K. employers are likely to face in the coming months, Faegre Drinker’s London labor and employment attorneys consider how employers can manage the economic impact that COVID-19 will likely have on many workplaces.

The global media has reported widely on the substantial impact of COVID-19 on the global economy and businesses. In the U.K., many employers will likely be facing significant economic pressures as a result of COVID-19 for the foreseeable future, even as the U.K. lockdown begins to lift. As a result, many employers will unfortunately need to look to reduce their workforce costs and recalibrate their businesses for ‘the new normal.’ Whilst mass redundancies have been much talked about (and feared) in the U.K., we explore the options for employers looking to avoid redundancies, as well as an overview of redundancy options if such measures cannot be avoided.

The U.K.’s Furlough Leave Scheme
At the outset of the U.K. lockdown in late March 2020, the government announced the introduction of a furlough leave scheme, formally known as the Coronavirus Job Retention Scheme. The government’s aim in introducing the scheme was to avoid mass redundancies and high unemployment by helping employers with their employment costs. Unlike in the U.S. where furlough leave was a well-known concept, furlough was an entirely new concept in the U.K. It has since been widely taken up by employers: as of 14 June 2020, approximately 9.1 million jobs from 1.1 million different employers were furloughed in the U.K.

Under the scheme, the U.K. government has reimbursed employers up to 80% of a furloughed employee’s wages, subject to a cap of £2,500 per month for each employee. The government has also reimbursed employer’s national insurance contributions and employer’s minimum auto-enrolment pension contributions.

Employees’ contracts of employment and employment rights continue whilst on furlough leave, including the right to accrue and take holiday, the right to sick leave, and maternity and paternity leave.

While the furlough leave scheme was originally planned to last until the end of May 2020, the U.K. government has recently confirmed an extension of the scheme to 31 October 2020, with a tapering down of the reimbursements that employers can receive under the scheme as follows:

- From 1 July, employers will only be able to furlough employees who have been furloughed for at least three consecutive weeks prior to 1 July. As such, the last date that employees could be placed on furlough leave for the first time was 10 June 2020.
- From 1 August, employers will no longer be able to claim reimbursement of employers’ national insurance contributions and employers’ minimum pension contributions.
- From 1 September, the government will reimburse employers for 70% of furloughed employees’ wages (up to a maximum of £2,187.50 per month). Employers will be required to pay 10% of wages to ensure furloughed employees continue to receive at least 80% of their wages (up to a maximum of £2,500 per month).
- From 1 October, the government will reimburse employers for 60% of furloughed employees’ wages (up to a maximum of £1,875 per month). Employers will be required to pay 20% of wages to ensure furloughed employees continue to receive at least 80% of their wages (up to a maximum of £2,500 per month).

From 1 July 2020, employers will also have the option to flexibly furlough their employees. Under this flexible furlough scheme, employees will be able to work part-time and be furloughed part-time. Up until 1 July 2020, employees were not allowed to carry out any work for their employer during furlough leave. Employers will be able to claim for reimbursement for 80% of employees’ wages, based on the proportion of the normal working hours they have not worked. The current £2,500 cap will be proportional to hours not worked. Employers will need to pay employees full pay for any period worked.
Q: If an employee was furloughed but has already gone back to work part-time, can that employee be furloughed again under the flexible furlough scheme from July onwards?

A: Under the scheme, employees will only be eligible for furlough from 1 July onwards if they have already been furloughed for at least three consecutive weeks prior to 1 July. So, if the employee has spent at least three consecutive weeks on furlough before 1 July but is now back at work, they can be placed on furlough leave again as part of the flexible furlough scheme. The employer will need to agree to the terms of the flexible furlough arrangement with the employee, and this should be recorded in a written agreement and kept by the employer for five years.

Reducing Employees’ Pay

Some employers may not be able, or may not wish, to use the furlough leave scheme. An alternative option for employers could be a reduction in employees’ pay. This is likely to be useful if employers need employees to remain at work but will not be able to pay them at their usual rate, or if they want to effect a reduction in hours as a result of a drop in demand for that type of work.

Any variation to employees’ pay constitutes a change to the employees’ terms and conditions. Generally speaking, an employer cannot change employees’ terms of employment unless the employees consent to the changes. In normal circumstances, employees would be reluctant to agree to such changes, but in light of the current economic climate, they may be willing to give their consent where it is a realistic alternative to redundancy. A consultation process would also need to take place with the employees to explain the proposed changes and their impact.

Employers considering such changes to their employees’ terms and conditions must be aware of the risks, however. As discussed in last week’s article, implied into all employment contracts in the U.K. is the duty of mutual trust and confidence, as part of which, employers must act reasonably towards their employees. Any attempt by an employer to impose a reduction in pay on its employees unilaterally would likely breach this duty, and give rise to a variety of employment claims, including for breach of contract and constructive unfair dismissal.

Employers who wish to change the terms and conditions of 20 or more employees and expect to dismiss (and potentially re-engage) the employees who do not consent to the changes will also need to comply with collective consultation requirements, as they would if they were proposing to make collective redundancies.

Q: For how long do I need to consult with the affected employees if I am changing the terms and conditions of employment of fewer than 20 employees?

A: If there are fewer than 20 employees, collective consultation requirements do not apply and there is no set time frame within which to conduct a consultation regarding changes to terms and conditions of employment. The length of the consultation will depend on a number of factors, including the actual number of employees affected, the number of changes being proposed, and the extent of such changes and their impact on the employees. With so few employees, a consultation would typically run between two to six weeks, but could be longer.
Lay-Offs and Short-Time Working

Employers may also have considered making lay-offs as a result of the current economic situation. In the U.K., lay-off is a form of temporary redundancy where employees remain employed, but are sent home with no pay because the employer does not have any work for them to do. However, employers can only lay off employees where there is an express right to do so in the employment contract.

In the U.K., there is also the concept of short-time working where an employer has less than 50% of the normal amount of work for employees and so only pays the employees for the amount of work that they do. As with lay-offs, short-time working can only be imposed if there is an express right to do so in the employment contract.

Lay-off and short-time working clauses were fairly common in the 1970s and 1980s in manufacturing or similar industries, but are not frequently found in employment contracts today.

Other Short-Term Options

Where employers have a short-term need to make savings, other mechanisms could be considered, such as asking employees if they wish to take unpaid leave and/or a sabbatical. Employers cannot compel employees to do so, but there may be employees who would be interested in unpaid time off because of their personal circumstances.

Employers also have the right to require employees to take their annual holiday allowance. Employers can give notice to employees to take holiday, provided such notice is twice the length of the holiday the employees are being required to take and there is no contrary contractual provision. Employees will be entitled to full pay for any period spent on holiday, so this does not ‘save’ the employer money. However, it can be a useful mechanism for employers who are currently experiencing a reduction in the amount of work available, but anticipate an increase in the future for which they want all their employees available for work.

Redundancy

As a last resort, employers may need to consider redundancies. A redundancy situation will arise where an employer shuts down, or intends to shut down, its business or workplace, or where there is a reduced need, or no longer a need, for employees to carry out work of a particular kind.

In conducting redundancies, employers must ensure a fair process is followed, which involves consulting with each affected employee individually about the proposed redundancy and its impact on the employee at all stages before any firm decisions are taken.

Where an employer proposes to dismiss as redundant 20 or more employees at one establishment over a period of 90 days or less, this will trigger collective consultation obligations, which will run in parallel with individual consultation.
obligations.

Among other things, collective consultation requirements will require the employer to notify the U.K. government of the proposed redundancies, consult with employee representatives about the proposed redundancies (and where there are no existing representatives, to allow representatives to be elected), and ensure the consultation begins in good time and (i) where 20 to 99 employees are likely to be dismissed, at least 30 days before the first dismissal takes effect, or (ii) where 100 or more employees are likely to be dismissed, at least 45 days before the first dismissal takes effect.

Q: What are the penalties for failing to consult with the employees about a proposed redundancy?

A: If an employer fails to carry out an individual consultation, it would be exposed to claims, including in particular for unfair dismissal from employees with at least two years’ service. Compensation in the event of a successful unfair dismissal claim can be up to GBP104,659.

A failure to comply with collective consultation obligations can lead to protective awards equivalent to up to 90 days’ gross (uncapped) pay per employee, and a failure to notify the government of proposed collective redundancies is a criminal offence punishable by a potentially unlimited fine.

In next week’s third and final instalment, we will be exploring some of the long-term changes and trends that we may see in U.K. workplaces following the pandemic.

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