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Welcome

Although we are constantly reminded in the media, it still seems difficult to believe that on 23 March a year will have passed since the UK entered its first lockdown in response to the coronavirus pandemic. Things have moved on a long way from those days in March last year when HR professionals and employment lawyers were struggling to interpret the new 'furlough' scheme, which at that time consisted merely of three paragraphs of guidance on a government website, and to fathom how it was intended to work in various different scenarios.

The furlough scheme (Coronavirus Job Retention Scheme or CJRS) has of course now been extended beyond the end of April this year. As that has been widely reported, we don't intend to go over that in detail here. However, we thought now would be a good moment to pull together some of the coronavirus-related issues which those working in the HR and employment law arena are having to address at the moment.

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At a glance

- No job, no job? Key issues for employers
- Resolving problems with the return to work
- Is 'Long COVID' classed as a disability?
- Employment tribunal claims show effects of pandemic
- HMRC anti-fraud measures
- Gender pay gap reporting
- Join our webinar with CIPD - details inside

Legislation update

with **Jenny Hawrot**

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No job, no job?

COVID-19 has created many challenges for employers. Between the sudden need to accommodate homeworking and the introduction of furlough, most employers have had to make changes to their working practices.

Thanks to the new vaccines, it looks as though there is now light at the end of the tunnel, even if it's not entirely clear how long that tunnel is. It does seem, however, that the more people who are vaccinated, the shorter the tunnel becomes and we can all get back to 'normal'.

But this raises the question – can employers require employees to have a COVID-19 vaccine?

The starting point is that there is nothing in law that can force anyone to have a vaccine. Any individual can refuse to be vaccinated. Indeed, the Public Health (Control of Disease) Act 1984 ensures that no one can be forced to have a vaccine. Of

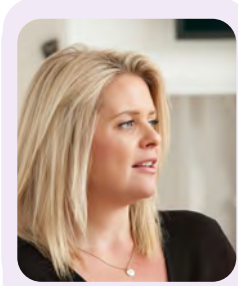


course, if any government tried to enforce this, there would likely be a breach of article 8 of the European Convention on Human Rights – the right to a private life.

As such, it would seem unlikely that employers can simply force employees to have a COVID-19 vaccination, as a general rule.

However, whilst employers cannot force employees to have a vaccine, the question remains; can employers refuse to employ someone, or subject an existing employee to disciplinary proceedings for refusing to get a vaccination at their employer's request?

On one hand, it can be argued that the requirement to get a vaccine is a reasonable management instruction where there are health and safety reasons for requiring employees to be vaccinated. Under the Health and Safety at Work Act 1974, employers have a duty to provide a safe working environment for its employees, so



Jenny Hawrot
Senior associate



there is an argument that by requiring employees to be vaccinated, the employer is fulfilling that health and safety obligation. As such, any refusal by an employee could be seen as a failure to follow reasonable management instructions.

Further, if employees are having contact with clinically vulnerable individuals (e.g. a retirement home, or other caring facility) employers have a responsibility to protect the health and safety of the people that are being cared for. Again, any refusal by an employee to get the vaccine at the employer's request could be seen as a failure to follow reasonable management instructions.

However, employers should be warned that if they do want to take action against employees who refuse to get vaccinated, there is a risk of a breach of human rights (as above) and discrimination legislation. For example, employees may refuse a vaccination due to religious reasons, or due to an existing long term medical condition. These scenarios could give rise to religious or disability discrimination claims. Further, 'anti-vax' beliefs could be protected as a philosophical belief under the Equality Act (although this is yet to be tested).

Age discrimination may also be another risk facing employers who want to insist on workers being vaccinated. This is because younger workers will be last in line to be offered the vaccination, and as such, they will find it more difficult to comply with the employer's requirements, in comparison to their older colleagues, through no fault of their own.

Therefore, any requirement for employees to be vaccinated should be thoroughly considered and balanced. Any action to compel an employee to have the COVID-19 vaccine should be

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proportionate to achieve a legitimate aim. Employers should consider – is it really necessary and justifiable? What are the risks if employees aren't vaccinated? Do these outweigh the rights of the individual refusing the vaccination?

Each case will come down to its own facts, and should be approached with caution.

That said, from the figures we are seeing from the vaccination programme, it seems that only a very small group of individuals are refusing the COVID-19 vaccine. So, in reality, there may only be a very small percentage of employees who will refuse to be vaccinated and hopefully, not many employers will have to face this problem.

ACAS has recently updated its working safely guidance, with further information about workplace COVID-19 testing and vaccination. It contains good practice advice about what to discuss with staff when implementing workplace testing – including how testing operates, how test results will be communicated, and how testing data will be used and stored in line with UK GDPR.

There are also helpful suggestions about how to support staff to get the vaccine. You might consider offering

paid time off for vaccination appointments, and full pay (rather than SSP) if staff are off ill with side-effects following a vaccine. The guidance is that, in most cases, it is best to support staff to get vaccinated rather than making it a requirement. However, if you feel it is important for staff to be vaccinated, you should consult with them.

The latest version of the ACAS guidance noticeably omits several points which previously featured. The guidance no longer states that:

- employers cannot force staff to be vaccinated
- employers should only make it mandatory to get the vaccine if it is necessary for someone to do their job
- if an employer believes that an employee's reason for refusing a vaccine is unreasonable, this may in some circumstances be a disciplinary issue.

Rather than an implied admission that these statements are incorrect, the removal of these points is probably more simply an acknowledgement that they are not straightforward issues. ■



A round-up of other pandemic-related issues

with **Matthew Clayton**

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Problems with the return to work



A number of our clients have sought our advice recently about problems encountered in getting staff back to work off furlough, or back into the workplace. One question surrounds the scope of the furlough scheme and whether it is legitimate to furlough people who, despite the re-opening of schools and childcare settings, are unable to secure childcare for pre-school children, or wrap-around care for school age children.

The answer lies in the wording of the Treasury Direction which sets out the formal rules of the CJRS. That allows you to claim in respect of costs of employment in respect of employees within the scope of CJRS “arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease.” So if the shortage of childcare provision is down to the pandemic then you could still continue to furlough the employee. However you would need to investigate what the drivers are for the shortage of provision; it is not hard to imagine that they may be linked with the pandemic.

A common experience amongst businesses who can only operate with their staff physically present in the workplace is that people are often too scared to return to work. If you can demonstrate that it is unreasonable for employees to do their job from home, that your workplace is COVID-secure, that you have conducted a proper risk assessment, and that you are following the relevant government sector guidance, then ending furlough and instructing staff to return to the workplace is likely to amount to a reasonable management instruction. However the importance of consultation with staff cannot be over-emphasised.

Different considerations will apply to staff who are shielding.

From 1 April 2021, clinically vulnerable people in England, who have been shielding, will no longer have to.

The Department of Health and Social Care will be sending out letters in the next 2 weeks, confirming that these vulnerable individuals no longer need to shield. Of course, they will still be required to follow social distancing rules, including working from home, where possible.

This also means that from 1 April, clinically vulnerable employees will no longer be eligible for Statutory Sick Pay or Employment and Support Allowance, based on being advised to shield. However, with the furlough scheme being extended until 30 September, you are still able to furlough these employees, subject to the rules of the scheme. ■

‘Long COVID’ and disability

Questions have also been raised about whether so-called ‘Long COVID’ amounts to a disability under the Equality Act. Disability is defined as a “physical or mental impairment that has a substantial and long-term adverse effect on a person’s ability to carry out normal day-to-day activities.” Although Long COVID is a new disease and therefore has no formal medical definition, when assessing whether the legal definition of disability has been met, a functional approach must be taken – i.e. focussing on the effects, not the medical causes. With this in mind, an employee with Long COVID would probably fairly easily demonstrate that they are suffering a ‘physical impairment’.

Assessment of whether there is a substantial effect on the ability to carry out normal day-to-day activities will require a detailed examination of that person’s abilities compared with their situation had they not been impaired. ‘Substantial’ in this context is a low threshold, being defined as “more than minor or trivial.”

It’s important also to consider whether there is a connected mental health impairment which might be impacting on day-to-day activities.

‘Long-term’ means the impairment has lasted 12 months or is likely to last at least 12 months (or the rest of the person’s life, if shorter than that). Evidence about Long COVID is only gradually emerging so we do not have a clear picture of how long its effects might last. However the word ‘likely’ here just means ‘could well happen’, rather than a balance of probabilities. Therefore, again it may be relatively easy for an employee to pass that threshold, especially if they have already been suffering for a period of six months or more.

So it’s clear that employers with employees suffering from Long COVID will have to take into account the possibility that they may be deemed disabled under the Equality Act, and treat them accordingly. ■

Effects of the pandemic seen in employment tribunal claims

A recent meeting of the employment tribunals national user group meeting for England and Wales heard the anecdotal view of Regional Employment Judges that there has been an increase in claims for unfair dismissal for redundancy; whistleblowing for alleged employer misuse of the furlough scheme and inadequate PPE; unpaid wages from those alleging they were required to work despite being furloughed; unpaid holiday pay (particularly during periods of furlough); and protective awards following alleged failures in collective consultation in relation to large-scale redundancies.

A request has been made for HM Courts and Tribunals Service to conduct an analysis of the notable increase in all types of claim during the pandemic. Whatever the outcome of that analysis, we are clearly now seeing the effects of the pandemic in the employment tribunal system. ■

HMRC anti-fraud measures

In January 2021, for the first time, HM Revenue & Customs published the names of employers who made claims under the furlough scheme in December 2020.

From February 2021, an indication of the value of claims made by employers is being published on a monthly basis along with employer names. Employees can see if they were included in a December 2020 claim in their personal tax account, and this information will be updated monthly.

Information relating to claims for January 2021 will be available to view from the end of March. Presumably the intention behind this is that employees will be able to ascertain if their employer is making a fraudulent or inappropriate claim on the CJRS, and will be able to report them. ■



Gender pay gap reporting

The Equality & Human Rights Commission has confirmed that employers will have an extra six months to comply with their gender pay gap reporting obligations for 2020-21, because of the pandemic.

Gender pay gap enforcement action for the reporting year 2020-21 will be suspended until 5 October 2021. ■

Are you making homeworking measures across your business more permanent? Let our experts help you.

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Rishi Sunak's Budget 2021: Employment-related developments

In the Chancellor's first Budget speech last year, made as COVID-19 started to take hold in the UK, Rishi Sunak promised to do "whatever it takes to support the economy".

As his second Budget was laid out, the focus was not only on surviving through the remainder of the crisis, but also how the public purse is going to pay for it, and how investment will be encouraged to help offset the mounting debts.

An eye-watering £65bn worth of new measures were announced to conserve jobs and limit the ongoing damage to public finances.

The Budget gave us few surprises from an employment law perspective.

- As anticipated, the Coronavirus Job Retention Scheme (CJRS – or 'furlough' as it is commonly known) will be extended until the end of September 2021. In the main, the CJRS remains the same, save that from July 2021, businesses will be asked for a 10% contribution towards the hours not worked by employees, rising to a 20% continuation in August and September 2021 as the economy recovers.
- The National Living Wage will be increased from £8.72 to £8.91 from April 2021 – a 2.2% rise and will be for people aged 23 and over.

From a PAYE perspective:

- There will be no rise in the rate of National Insurance contributions, or Income Tax.
- The Income Tax threshold for paying the basic rate will rise from £12,500 to £12,570 in April 2021, and will be frozen to 2026
- The higher rate Income Tax threshold will rise from £50,000 to £50,270 in April 2021, and will be frozen to 2026.



- HMRC will be setting up a new 'task force' with the specific role of investigating tax fraud, which will, of course, include furlough fraud!

All in all, it's fairly positive news for employers as the support to pay employees' salaries continues for another 6 months, although this will be gradually reduced and businesses will be expected to make an increased contribution from July onwards.

The increased tax thresholds are good news for employees in the short term, but the 5-year freeze (until April 2026) means that the benefits will be short lived for those who receive pay rises in the coming years. The thresholds are not due to increase until 2026, meaning that employees may find themselves in a new tax bracket, and having to pay more than they would usually anticipate. ■

New and upcoming issues in equality & diversity

Webinar with Gloucestershire CIPD

Tuesday 18 May | New and upcoming issues in equality and diversity | 09:30-11.00am | Join via Zoom

In this webinar from the Gloucestershire branch of **CIPD**, our *Legal 500*-rated employment law team will take you through recent developments in the law surrounding equality and diversity.

We will be talking about gender fluidity, neurodiversity, the ethnicity pay gap, caste discrimination and the discriminatory risks of using artificial intelligence decision-making.

[Click here to find out more and to book your place.](#)



New statutory rates announced

The new April 2021 rates for the **National Living Wage** will be:

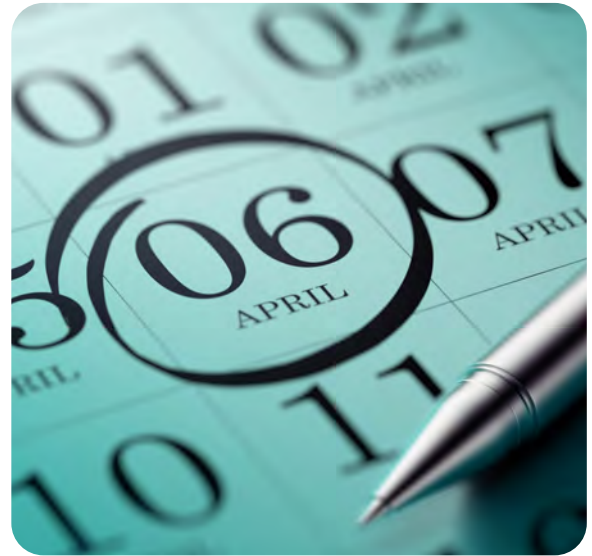
- Age 23 or over: £8.91 (up 2.2% from £8.72).
- Age 21 to 22: £8.36 (up 2% from £8.20).
- Age 18 to 20: £6.56 (up 1.7% from £6.45).
- Age 16 to 17: £4.62 (up 1.5% from £4.55).
- Apprentice rate: £4.30 (up 3.6% from £4.15).

Family-friendly payments (statutory maternity, paternity, adoption, parental bereavement and shared parental payments) will increase to £151.97 per week (from £151.20).

Statutory sick pay is set to increase to £96.35 per week (from £95.85).

The cap on a week's pay for the purposes of calculating **statutory redundancy payments** is rising from £538 to £544.

Changes to the calculation of **Post-Employment Notice Pay** will also take effect from 6 April 2021 to rectify an unintended consequence of the present formulas, which allow for more or less favourable outcomes depending on when in the year employment terminated. ■



More news on our website www.willans.co.uk

Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

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