****

**‘A guide to the CoronaVirus (COVID-19) Legislation**

**Supplement 1’**

**By:**

***Patricia Leighton***

We now have a little more information so that you can check your procedures/decisions etc. Just before we do that we need to note a few recent developments in law-though I am sure you will have picked them up. It is also important to remember that what is happening is unprecedented and so being able to predict outcomes is very difficult. At times like this I think it is very important to bear in mind the role of health and safety law.

This is a non-negotiable area of law. It lays down strict duties, requires coo-operation from all at work and provides basic protections beyond those of simply being protected from physical harm. For example, S 100 (1) (e) allows people to leave/stop work and advice others to do so if there is imminent danger and protects people from dismissal and other detriments. I noted today that nurses in some hospitals have been threatened with dismissal if they complained/went public on the shortage of, say, PPE. This is a very serious ‘gagging’ and is not only breach of the whistleblowing laws but health and safety, too.

**We have some other changes in law that include;**

* Deferring the equal pay reporting requirements
* Delaying IR 35 for the private sector to 2021
* Some relaxation of the DBS scheme-the possible use of video evidence, though the certificates will have to be shown when work starts
* Up to 4 weeks holidays can be carried over for up to 2 years, but staff will still have to comply with your contractual requirements as regards timing, notifications etc.
* SSP changes include the ability of smaller employers (<250 employees) to claim up to 2 weeks payments if staff off due to illness caused by the coronavirus. There is no need for a Fit/sick Note but employees can ask for Isolation Note NHS 111 on-line if they are ill or someone they are living with is ill (With such limited testing the simple thing would be to ask for test results but these are very limited)

**Some further information on unpaid leave**

Guidance is available from HMRC. It is estimated that the scheme will be up and running ‘by end of April’. It only runs for 3 months from1st March, so information is only likely to be available towards the end of the relevant period. As is known, it only covers people on the payroll on 28th February and if they are not currently on the scheme they cannot now join. So this clearly reduces the options for employers where they feel they need to take some action from here in.

The options were to have staff working from home (See Guide); to use the unpaid leave scheme or where the rules apply to have staff of sick leave or of course, to put them on redundancy of some sort. To make changes to hours of work etc. took you outside the government unpaid leave scheme. The scheme seems quite wide-ranging- e.g. covers part-timers, fixed term and zero hours staff but rather inflexible in terms of not applying to staff already on unpaid leave for whatever reason, or those, as mentioned above who had already had changes to their work in terms of, say, reduced hours. However, if you had declared people redundant but then found you could re-engage them the scheme can apply. This seems a bit odd because if work does become available you would maybe want people to work not be on unpaid leave.

Some of the uncertainties, as I see it, are around the money. The legislation is fairly imprecise and speaks of ‘wage costs’, though employers can claim for NICs and auto-enrolment pension costs. The payment, as we know, is only for 80% of wage costs. There is no obligation to top it up, though some advisors have spoken of the possibility of awarding a major pay rise! Though it would still have to fall within the £2,500 monthly limit.

There appears to be no guidance on the position if an employee on unpaid leave gets ill while on leave. Some argue that if there is no requirement to work, sickness is irrelevant. In any case it looks unlikely that an employee could claim both the 80% and sick pay. As SSP is a very low sum, it may well be a disincentive to report illness to you anyway. If you have a generous occupation sickness scheme that covers full pay for a set period this could well be advantageous for employees. There is no official Guidance on this to date as to whether you can be on leave and on sick leave as well.

So; to some other questions (You must add your own below)

1. ***Can staff refuse to go on unpaid leave?*** It has been assumed that the 80% scheme would be an incentive as an alternative to redundancy.

As the scheme represents a variation of contract, depending on your ‘change rules’ they might be able to. They do not; though have a right to demand work-only pay, which is now affected by legislation. If they do refuse, you can then make them redundant. If they claim unfair dismissal, it is likely SOSR would apply.

2. ***What if they are discovered to have been earning from another source during the leave period?***

This disentitles them to pay. In any event there is nothing to stop you reminding employees that although they are not required to work, all other terms of their contract remain in place (Unless you have varied any, in accordance with your contract). There may be some items, travel costs/provision of protective equipment, entitlement to social and sports facilities etc. that might need clarifying. It is assumed employees are covered by all the other guidance about travel/social contacts etc. You might need to think also about work equipment, e.g. phones and laptops, vans, etc. that you do not want them to use during the leave. (Have you checked the insurance position?)

An interesting question might be if they are arrested or even imprisoned, can you dismiss them? If your company name gets prominence and say, was for spitting at a police officer, a dismissal might well look fair.

***3. What about holidays and unpaid leave?***

There is no guidance whatsoever on this from BEIS. Holidays are paid at 100% and include extra payments, like commission. It can be to the employer’s advantage to ask employees to take holidays as it provides more flexibility later when ‘normality returns’. Many commentators have pointed out the differences between unpaid leave and holidays as regards pay and other matters. However, I doubt you could require staff to take holidays. We are still governed by EU legislation and case-law. It is a health and safety measure. In the current self-isolation and business closures, lack of flights etc., I have my doubts whether this would be lawful. It is simply a perpetuation of spending time mainly in your home.

If you permit an employee to take holidays or you can lawfully require them to, you would have to comply with rules as to holiday pay, but it is thought you could recoup 80% of basic pay from the Scheme.

4. ***What is the relationship between unpaid leave and other forms of leave, such as maternity, adoption, bereavement for death of child, etc.?***

Again, aside from maternity we have very little guidance on this. Given the nature of some of the special leaves, it is likely that some will be hard to access anyway, but that others in the current situation can run parallel with unpaid leave. For maternity it seems the usual rules will apply for up to 39 weeks leave, some of which may coincide with unpaid leave. Insofar as the employer is providing enhanced pay this can be offset by the leave scheme.

5. ***What are some of the best; practice rules when employees are working from home? – Add to discussion***

***6. What about short time working, lay-offs and redundancy? What are the basic rules?***

We have seen far more debate in recent years about skills shortages than redundancies. Although we have seen dismissals caused by the failure of, say, high street stores, high profile restaurants, the current situation is very different. The basis of the law is the demand for skills has declined or ceased. If it is likely to be short term than a lay-off or short time working might be an answer, but the current outlook looks longer term.

Short time working precludes claims under the unpaid leave scheme. However, such workers, along with those laid off have rights under redundancy legislation. If the lay-off and short time working lasts for more than 4 weeks or 8 weeks in 13, there is an entitlement to a redundancy payment. However, against this there is the legal rule that unpaid leave/short time working etc., keeps the contract ‘alive’ so those working from home or still working seem to be more vulnerable.

For some especially older and long serving employees there is much to attract you to a redundancy payment. This would be especially if the employer was offering more than the rather small statutory payments. We do not know how long the unpaid leave scheme will last, -beyond three months? But there seems nothing to preclude redundancy at the end of it.

Redundancy is one of the longest establishes areas of employment law. It requires evidence of a declining or ceased need for skills, or for skills of a particular kind, plus careful handling. One feels that the requirement of the offer of suitable alternative employment will not often be possible, so it the communication and selection processes that will be examined. However much perceived urgency there is to get matters sorted, care must still be taken. The law does not generally require ‘redundancy’ to be a ‘reasonable’ choice or require transparent exploration of other options (Including the unpaid leave scheme). However, it is assumed that the 80% payment should give breathing space at the least, but again we do not have much to go on.

7. ***What are your key questions? Just lob them over and we can discuss them at out on-line meeting.***