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**‘A guide to Implications of (COVID-19) Emergency**

**Supplement 3’**

**By:**

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Another day; another update from government, plus a reminder of the basic question of health and wellbeing for workers and others at this time.

When I started this Guide, it was health and safety that I put at the top of my agenda. Let us remind ourselves why this is such a major legal topic. First, legislation is very strong-it’s part of our criminal law as well as providing a framework for civil claims for compensation. Second, it is backed up with employment rights, e.g. the right to stop work and advise others so to do, and third if claims for compensation are appropriate, there is three years (Not three months if ET claims are made) to bring a claim. There is also the implied term in every employment contract, which requires the employer to ensure the health and safety of employees. If broken, a claim for constructive dismissal can be made. Conversely, if an employee is disciplined or dismissed for breaking H&S rules, the law is generally sympathetic to employers and we have a fairly rich body of case law on this topic generally.

In the Zoom session we did last week, I also raised the question of potential H&S risks for those working at home, maybe especially if they had not done so before. The data is there as regards risks, including stress and other mental health concerns, but also in terms of whether their work environment is ‘safe’. There may be hazards in the home, but also risks from, say, the failure to take breaks, working strange hours etc. bearing in mind the Working Time Regulations continue to apply regardless of where work takes place.

Communication with employees is therefore vital, and it may be easier to assess their wellbeing if contact includes ‘visuals’. (You can see where they are working but also look at their demeanor etc). Clearly, it is not possible to visit but there are options for keeping in touch and ensuring they are well. Similarly, if an employees reports they are unhappy or concerned about working at home, this should be responded to in some way. It might be possible to return them to the workplace (I have a case at the moment where an employee who suffers from depression asked to go back to work in the workplace but was initially tuned down. The request was finally agreed to and safeguarding measures put in place at the workplace). We also now know that the incidence of domestic violence, suicides and mental health problems are reportedly growing-so care must be taken.

It is also important to remember that furloughed employees, whose contracts remain alive, though they are not required to work, remain covered by H&S laws, though, realistically the obligations will be lower.

Making claims for repayment

The government has now issued information about how to make claims for repayment of the basic 80% of wage costs for furloughed employees.

(<https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>?) The only major change from before is that employees who were furloughed by 19th March 2020 can now be claimed for. Apparently, this is to allow claims for employees who resigned or were declared redundant but who were then brought back via furlough. (I guess if the reverse happens-i.e. a furloughed employee is then dismissed before 19th it is not possible to claim for them, as they have not completed three weeks leave?)

One important issue that might catch out employers is clarification that claims can only be made where there is a signed agreement between employer and employee to the furloughing. Statements without agreement may well disqualify claims. In the first edition of the Guide, I had suggested that you formally clarified what exactly furlough is, what terms remain in place and of course deal with the point that they should not undertake any work for you, directly or indirectly. A furlough is, essentially, a variation of the contract and should have been treated that way. It seems if this has not been done at the time of furloughing, it cannot be remedied. Records of agreement have to be kept for 5 years.

I suggest you check the complex areas in the latest document-e.g. as regards salary sacrifice, sickness, NMW, and leaves. There is also in the guidance, information (/p10) on what you need to claim. The guidance also confirms that employees must be paid the 80% in full-with no deductions for, say, admin