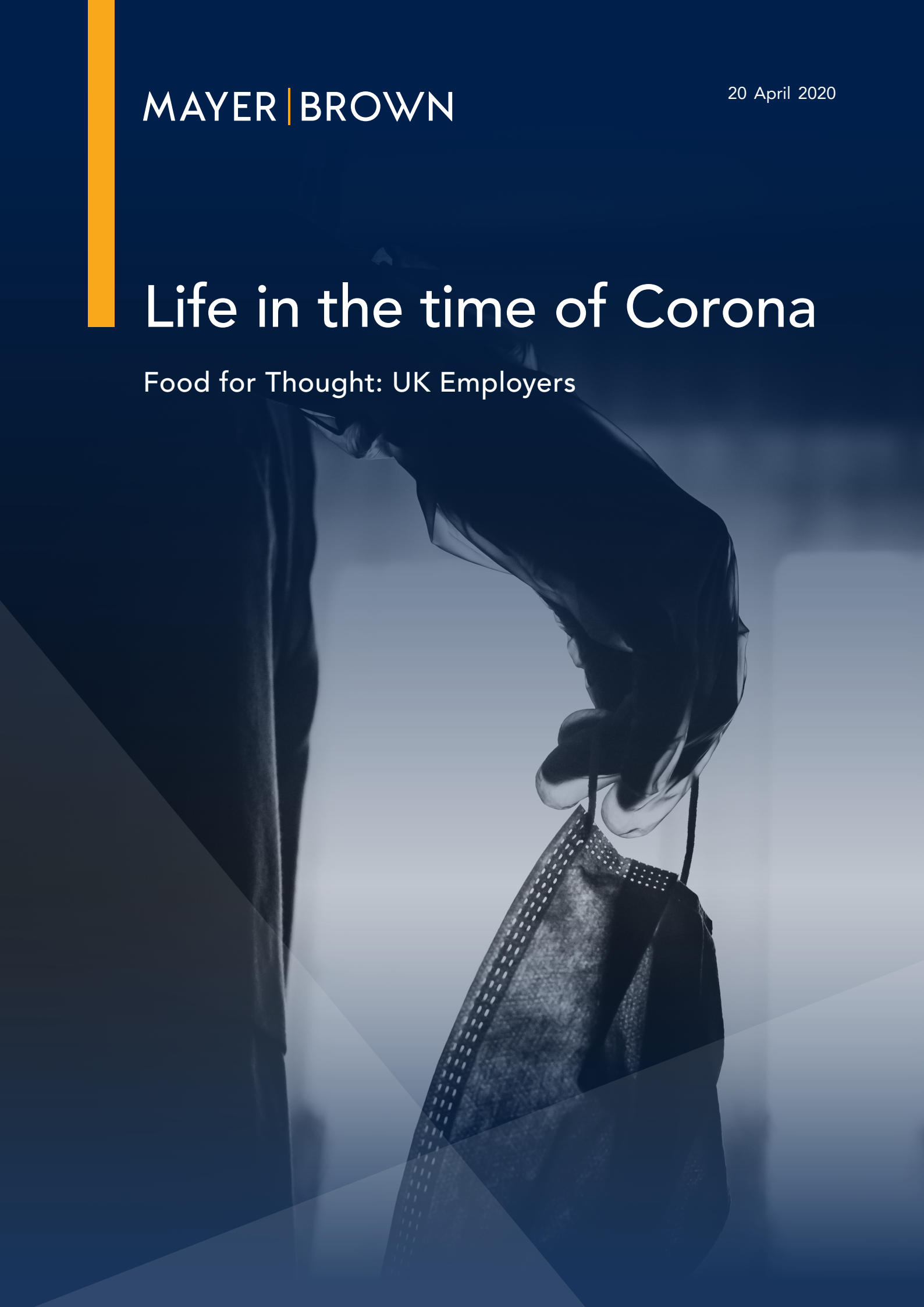



Life in the time of Corona

Food for Thought: UK Employers





If it is true that it is darkest before the dawn, then a number of countries worldwide are rightly turning their minds to the possibility of easing the current lockdown arrangements. This Article looks at what steps employers should be starting to take now to prepare for a partial or full return to work. Clearly, aspects of life will take longer to return to normality than others. However, employers who are not addressing these issues now are likely to be left behind when current restrictions are eased.

We consider the likely short and long term business issues which employers should be considering now as well as some of the likely employment challenges that employers are going to face. However, the one certainty in all of this is that some of the challenges will be unexpected. Preparing for the known and the unknown will also help create space for the unknown unknowns when they move into the known category.

01.

START YOUR PLANNING NOW

Many employers are making use of the UK Government's Furlough Scheme. It is unclear how much warning employers will get of the imminent end of the Furlough Scheme. Employers could therefore be faced with a situation where they have to take decisions in a hurry as to how to cope with the end of that Scheme and what it means for their businesses. The process of communicating with a furloughed workforce, where often individual employees will have differing challenges in a return to work, is potentially time consuming and will require careful thought. This is the case even if an employer is clear about what it wishes to do with each individual employee on furlough. Similarly the process of getting employees back to work is not as straight forward as simply instructing them to return to work the following day. Business life is clearly going to be disrupted for many operations. Employers that are able to organise an efficient return to work may be in a far better place to compete for supplies of necessary equipment which they need to operate, e.g. in the manufacturing sector. The first mover advantage can be critical in enabling businesses to survive or indeed potentially thrive at the expense of competitors. None of this can be done properly on the hoof.

02.

LONG TERM DECISIONS AFFECTING STAFF

It is clear that employers will need to be realistic about their future long term staffing needs. The world economy is set to contract. It is a certainty that many businesses, once the Furlough Scheme and similar support have ended, will look to make redundancies.

POTENTIAL HEADCOUNT REDUCTIONS

Any headcount reduction needs to follow a dispassionate analysis of the employer's business, which will, inevitably, take time. Key questions for employers include:

- What is the likely position post lockdown in the foreseeable future in relation to key customers and key markets?
- Will key customers and key markets be generating anything like the same levels of demand for services or products?
- Is the business likely to be constrained by a lack of supplies into the business?

Employers should be looking at headcount issues now. In the UK, collective redundancies with more than 20 staff at a location can easily take two months or more to conduct in accordance with the necessary legal requirements. If the employer leaves such planning until after the end of the Furlough Scheme is announced or when a partial return to work is ordered, it is simply adding costs onto its business which it may be ill equipped to afford. There is nothing inconsistent in the UK's Furlough Scheme with an employer planning for redundancies now. Even if many employers are currently starting collective redundancy consultation, there is nothing in the Furlough Scheme by itself which would preclude an employer from commencing collective redundancy consultation during a furlough period. Naturally, few employers would want to be giving notice of termination to staff by reason of redundancy whilst they could still be furloughed (although there will be some necessary exceptions). However, employers could significantly reduce the period after the furlough period ends, when they are back to paying for all of the employees' costs, if consultation begins sooner rather than later.

Employers will need to be mindful that employees made redundant, whether before or shortly after the end of the lockdown period, will need all the support that the employer is able to offer. The prospects of finding alternative employment, for many, may be bleak. Equally, employers will be mindful that staff who are being retained may feel disengaged or demotivated if they see their employer shedding colleagues in a mechanistic or unthinking fashion. It will be more important than ever that employers have given full consideration as to how these arrangements can be handled most appropriately, and at the appropriate time. Time spent thinking about what support (outplacement, counselling etc.) could be given would be time well spent.

Other employers may wish to scale back hours so that an individual will move onto shorter working weeks permanently with a consequent reduction in salary. This may be seen by some as a better alternative to redundancies. However, in practice, in the absence of express terms in the contract permitting this, it would need to be treated as a potential collective redundancy. An employer is unlikely to have the power in most cases to force through a cut in hours without the employee's consent.

EXPLORING WIDER OPPORTUNITIES

Conversely, and counter intuitively, it is also necessary for employers to look for opportunities in the current environment gained by being the first movers. For example, an employer who wishes to strengthen an area of its operations should be considering whether there is strategic hiring to be

done now or immediately after the end of the lockdown when businesses are starting to open up. In the recession in 2008/09, we saw employers who might previously have looked to buy businesses look instead at hiring key staff and their team's outer competitors as a cheaper way of increasing turnover and strengthening their operations. Our Hong Kong colleagues saw the same thing after the lockdowns implemented to address SARS in 2003 and Swine Flu in 2009.

Employers should be looking, realistically, at their operations, to see what could be strengthened and what could be expanded, and then where that recruitment could come from. Is it internal promotion? Is it by retraining employees? Both of those can be done now, during lockdown especially since training of furloughed staff is actively encouraged by the UK Government and can be done remotely. It may be trickier for staff who are currently working, but if they are being promoted within their current group or department, then it will normally be possible to get that process underway unless resources are very stretched.

If employers conclude that there needs to be external recruitment, then that too can be overhauled so that it works as fast as possible, and as efficiently as possible. For example, if employers believe that they need to recruit key staff, then review now the whole standard recruitment process, contractual documentation, condition of offers, and authorisation limits for hiring. It is going to be key for such employers that the whole process can work remotely, and both efficiently and speedily.

UNDERTAKING POLICY REVIEW

In that context, we think employers should also be reviewing all of their staff policies to see how well they can be applied to remote working and whether the policies can actually be operated remotely. It is likely that there is a need for enhanced remote working, either as a result of the pandemic or as part of a permanent shift to increased homeworking on the part of the business. In the context of recruitment, do the employer's policies envisage in-person interviews as part of the process? How will interviews for the recruitment of staff operate, for example?

The review of policies should not stop at recruitment policies. We have selected a few policies that need to be rethought:

- **Grievance/disciplinary policies:** Are there policies in place (for example, grievances or disciplinary hearings) that tend to require personal contact but which could be operated remotely? There are likely to be many such examples where the assumption of face-to-face interaction in person is outdated.
- **Sick pay schemes:** Employers' sick pay schemes will need to be reviewed. Employers may have had far greater take up of these than they previously experienced. Are they willing to maintain that exposure? Did they find some employees were not getting the cover they needed and so should cover be extended or changed? What about the requirements for medical evidence after 7 days?
- **Homeworking policies:** It is likely that many employers will need to consider whether to rebalance the split between office working and homeworking. Many businesses have compulsory homeworking of one kind or another already. Equally, other businesses have a voluntary or quasi voluntary homeworking regime. Prior to the lockdown, employers may also have permitted certain employees, but not others, to work from home. As a result, employers may find that many more employees are pushing hard to be allowed to work at home regularly, even in jobs where this has previously not been permitted.
- **Policies requiring paper documents:** Policies and procedures may need reviewing for other assumptions which are less appropriate in a work from home environment. For example, a requirement that paper copies of documents are printed and stored obviously makes far less sense when the employee is working from home and may now simply represent an inefficient approach. There will be many other changes identified in a thorough review.



Employers should be looking, realistically, at their operations, to see what could be strengthened and what could be expanded, and then where that recruitment could come from.

HOMWORKING ARRANGEMENTS

Employers should take the lessons from the current lockdown, where employees have been able to work from home on a prolonged basis without interruption, and decide whether the homeworking was as efficient as it could have been. If so, does this allow businesses to work permanently from home to a far greater extent than has been done before, with consequent savings, e.g. on office space and support? That is likely to raise the issue of whether employers can require employees to work at home rather than coming into the office.

This will depend primarily on terms of the contract of employment. Does the contract have an express clause entitling the employer to direct where the employee works? If the employer wishes to introduce a permanent change requiring an employee to work at home for all or almost all of their working time, then this will probably require employee consent. It may be less clear cut where there is to be a higher percentage of work being done from home with hot desking etc., in a shared location. The danger for an employer is

that if the employee has been directed to base themselves at home rather than at the office, then this may well amount to a constructive redundancy (as well an unfair dismissal if it is handled incorrectly) giving the right to the employee to resign with a statutory redundancy. If the employer acknowledges these changes and is looking to force them through, then that is almost certainly going to be a trigger for collective consultation which would again slow down the implementation of any such changes.

If an employer considers that increased homeworking is likely to feature long term in its arrangements, then it may wish to consider reviewing any guidance it provides on effective homeworking for its staff and effective training of managers who are responsible for teams with regular homeworking now embedded in their working practices.

03.

TEMPORARY STAFF PLANNING

If there is a need to conduct clear sighted and careful analysis of the long term decisions to be taken in connection with staff then this is compounded by the need to consider a number of the issues which may arise on a transitional basis as employees come back to work.

UNDERUSED STAFF

For example, there will be a need for careful management of staff who are being required to return to work but who may be under-employed in the initial stages. If an employer, who has analysed matters carefully, has decided that it does need to retain staff in certain categories, even though they are underused initially, this must be made clear to the employees concerned, or the employer is likely to find staff who stay are disengaged, or staff are more likely to leave for employers with clearer statements about the future and what they can expect.

OVERWORKED STAFF

Conversely, there may be certain areas which are extremely busy and are overworked, as the business gets back up to speed again. Where employees are in a production cycle, employees at the front end may be more heavily engaged than those at the back end initially. Those working in chasing invoices may be heavily engaged, in trying to assist the management of the cashflow, whereas those responsible for issuing invoices etc. may have less to do in the initial stages. All of this needs to be addressed by employers with careful messaging to the overworked staff that this is not intended to be the norm and is a part of a transition process. It may, of course, be possible to switch staff from underutilised areas to overworked areas on a short term basis.

DIVIDING/ROTATING STAFF

One idea which is gaining significant traction is the idea of investigating whether it is possible to divide employees into teams and then rotate teams in and out of the requirement to come into the office or work location. Clearly, this will not work for all. Some work may have to be done at the business location, or the size of a particular part of a business means that there is insufficient staff to make this practical. But in many cases this will be feasible.

Dividing staff into teams and then rotating teams on and off the need to attend business premises is recommended as a transitional step. We consider further below whether staff will be happy to return to work, and if so, what employers should do about staff who are reluctant to return to attendance at the office or work premises. Staff may have legitimate concerns about e.g. travelling on crowded commuter trains. A system of rotating teams of employees will allow the employer to demonstrate that it is not simply unthinkingly returning to the old norms of requiring people to come into the office to do their work. This will cut down on the need for commuting and social interaction at work. This, in turn, will be seen as considerate towards employees, and reducing the risks of infection, especially for those with long travelling on public transport. If one or more members of a team become ill with the coronavirus, then it is, by definition, less likely that the teams that are working on different days will be infected and so the employer will have greater continuity in its operations in the early stages, where there is a risk of a recurrence of the pandemic, as lockdown restrictions are relaxed. It also avoids the dangers of an informal practice growing up where senior management may permit itself to work at home and junior staff are expected to attend work on a normal basis. Even the perception that this was happening would be detrimental to the employer's business.

Whether or not rotation by team is feasible, the employer may need to consider whether start and finish times can be adjusted to enable people to travel outside of regular hours, or to avoid crowded exits from an employer's buildings. Similarly, can an employer create zones in any of its buildings so that staff on a particular floor do not visit other floors unless it is necessary for a face-to-face discussion in person?

Any such proposal needs to be explained carefully to staff, why the employer has taken this approach, how it is to work and whether there would be exceptions to the rule. Also, obviously, this will take a greater degree of management if a manager's team is being split into sub-teams. Will the employer expect, say, the manager to be in every day, working with rotating teams, or will the manager too be absent for certain days and working remotely? How will supervision work remotely? Again, as with so many of the issues which we have raised already, this takes advanced planning and thought and cannot be done in haste.

ANNUAL LEAVE

It is widely recognised that holiday leave in 2020 is likely to become a challenging topic for employers. Indeed, it is already proving to be a bit of a hot button issue for employers during the lockdown. Some employers are requiring employees to take holiday, whilst they are either working from home or they are furloughed. In the absence of any direct statement from HMRC that employees taking holiday are outside the Furlough scheme, then we think that employers are entitled to require employees to take holiday whilst furloughed or working from home during lockdown. There is clearly no problem at all, from a legal perspective, with encouraging employees who are working to take leave and, at present, there is no indication that the eligibility for the furlough grant is affected by an employee on furlough taking a period of holiday. Naturally, employers will need to be mindful of their staffing requirements if they are encouraging employees to take holiday, particularly if they have furloughed other staff, and so staffing may have been cut to the bone.

However, operationally, employers who do not take any steps to encourage or require employees to take holiday during this lockdown period, whether they are working or on furlough, are creating a problem for themselves down the road. Most staff will have taken the view, we think, that holiday in the current arrangements is less attractive. It is clear that there is still a benefit to holidays and the ACAS guidance note on the furlough scheme is correct to point out that employees would still benefit from taking a period of time away from work. However, many employees, confronted with the prospects of a staycation, when they are working from home as well, will prefer to defer holiday until travel restrictions are lifted. This, of course, creates an obvious challenge to the employer. What is the employer to do when a significant percentage of its staff wish to use a very significant percentage of their annual holiday entitlement in July and August? If it is right that there is a risk of a return of the pandemic in September, many employees are going to wish to make maximum use of their holiday whilst they can. How is an employer to conduct its return to work if this is at the very time when it is looking to get back into work, if staff are demanding the right to take holiday? This is not an issue which can await the announcement of a relaxation of the travel restrictions and lockdown more generally. Some staff, seeing the likely relaxing of restrictions, will wish to get their holiday applications in for June, July and August now. This is likely to create resentment amongst those who find that the sun loungers around the swimming pool have been booked by those who got there first.

We suggest that this can only be managed on a company-wide basis by setting out a clear communications policy about what the employer's expectations are and how it is going to address competing demands for holiday fairly. [The Government's statutory amendment permitting the carryover of statutory annual entitlement](#) may be helpful. However, it is one thing to have an ability to defer holiday over. It is quite different to say that the employer has the right to defer an employee's holiday into a subsequent year. Even if the employer does have the right to do so, it may be very demotivating for an employee to be told that having worked throughout the period from home, the employer is then preventing the employee from taking their holiday entitlement for the rest of the year. It is important to bear in mind that employers owe their employees a duty of health and safety. Holidays are directly linked to an employee's health and welfare. If an employer seeks to avoid this logjam by prioritising those who worked throughout this period, then this will perpetuate the divisions between those who worked and those who were furloughed and, we think, it is important to eradicate those divisions to ensure an effective return to work for the business.



It is clear that there is still a benefit to holidays and the ACAS guidance note on the furlough scheme is correct to point out that employees would still benefit from taking a period of time away from work.

04.

TEMPORARY BUSINESS ISSUES

There are likely to be a number of short term business issues that directly affect staff to which employers should be turning their minds now, so that effective guidance and consultation can take place in good time. Employers cannot assume that the old norms of behaviour when doing business are going to apply in the short term. We set out details of the health and safety duties for UK employers in our guide for [Managing HR Through COVID-19](#).

To take just three examples:

- What is to happen with an employer's entertainment policy? The old assumption that client entertainment consisted of face-to-face meetings for a lunch or a sporting event or a cultural event has got to change. In the short term, what is the employer going to do, bearing in mind its obligations in relation to employees' health and safety, about either facilitating such contact or regulating it? Can the employer identify employees who are involved in marketing to focus on means of winning business or relationship management that are as effective as personal contact? (Some have suggested that writing lengthy articles on the furlough scheme in the UK may not be as effective as personal contact with your clients).
- What will the employer's travel policy be, even assuming travel restrictions are allowed and the aviation industry is operational again? Merely because an employee can travel to China, Italy or Spain, does it make it an appropriate requirement to send an employee there? Who will be authorised to take such decisions and what factors should they be considering before the travel is authorised? Will an employer make use of individuals who either tested positive or identified as having the coronavirus to take on more travel, in preference to those who have not had the virus? Much will depend on the medical evidence as to whether or not such individuals have immunity from future infection.
- What is to happen with the hosting of meetings with clients, customers or suppliers in the employer's offices? The greater the number of people visiting an office in the transitional period, the greater the risk of infection spreading again. Will someone need to authorise large-scale meetings before an employer agrees to host them? This is really part of a larger policy that is needed on who has access to the employer's premises and how this is to be handled.

Clearly, employers, since they have a duty to take reasonable care of the health and safety of their employees, are going to need to address health and safety concerns within the working environment. This will need to be addressed location by location. Different issues will arise where an employer has a hot desking environment where work spaces are not single occupancy during the working day. Will employers have to put screens around individual work spaces and be more rigorous about ensuring how many people attend the business location to avoid overcrowding? Different challenges may be faced by business locations where individuals have single or shared offices with a much lower density headcount. Meetings behind closed doors with team members may be an ideal way of spreading the virus. Will there need to be an understanding on office etiquette that you do not visit someone's office uninvited? We have heard of examples in China, which is closer to resuming normal working, that some office spaces have been redesigned to reinforce social distancing in lifts, for example, or on an office floor by the use of floor markings. One Chinese company was quoted as saying it is now providing food directly to individuals' desks to eat at their desk to minimise usage of any communal eating spaces.

Many employers will need to consider whether to introduce virus testing for their workforce. This creates a number of issues and we wrote about those. However, employers should be prepared to say either why these tests are being adopted or why they are not being implemented. Equally, there is some talk of contact tracing apps which could be issued to staff which would enable an employer to help protect its staff from infection at work. Mayer Brown have written more about the [NHSX app](#).

Employers will wish to make clear to staff the steps which it is taking to ensure health and safety in the office to restrict, so far as possible, the spread of the virus. The message will need to be reinforced that employees who are feeling unwell should, under no circumstances, struggle into work. Supplies of hand sanitiser will need to be resourced. Messages on social distancing will need to be reiterated. We may yet see facemask wearing in the office in the UK. Should an employer be encouraging this? Should the employer be encouraging this for those commuters who rely on public transport? If so, should the employer be providing the face masks in accordance with its duties of health and safety? Employers should consider obvious hotspots for potential infections. Shared kitchens may need to be reviewed (communal office mugs anyone?), vending machines and the like may be discontinued, access to canteens on site may need to be restricted to avoid



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overcrowding at peak times, and drinks in the office to mark the end of the week or birthdays, client wins and the publication of another coronavirus update alert may be suspended. Whilst this is clearly likely to be viewed as making working life harder or less enjoyable, the challenge for employers will be to find other ways of assisting employees in the workplace and creating the bonds that make teams work well together.

Employers also need to be mindful of their legal obligation to report instances of infection which take place at work. Obviously, a resurgence of working in the employers premises will increase the chances of infection spreading within a workforce. Employers are under a legal duty to report any such instances and there are significant criminal penalties for employers who do not comply. We wrote about this reporting obligation [here](#). However, that obligation can only be discharged if staff know that they need to tell their manager or a designated person if they are feeling unwell in circumstances which might indicate they have caught the virus. As part of any return to work strategy this obligation needs to be made clear.

We also think that employers should be thinking now about a potential resurgence of this pandemic later on in 2020. Medical experts have indicated that this is a potential risk. Equally, it follows that until the discovery of a vaccine, the relaxation of lockdown will potentially increase the risk of the spread of the virus, prompting further lockdowns. We think that employers should be looking now at collating the experience of those most closely involved in managing the business or working or being on furlough, to identify areas where operations were robust and those areas where matters could be improved, e.g. by the acquisition of more technology or by changing working practice. This can be used to further the transition back to more normal working patterns and

encourage the integration of such staff back into the workforce by showing staff that their opinions are being canvassed and listened to. Equally, the perspective from someone furloughed in a large house with one or two adult family members around them, is likely to be very different from someone who was required to keep working but did so in a small flat with a partner, two young children, a large dog and no garden. They have valid viewpoints to give on what worked and did not work during lockdown. The views of both should be taken into account. What if the employee runs short of the things they need to keep working at home? Can more be done to support staff working at home? Can more be done to continue a sense of engagement for staff in a resumed lockdown, given that it may well be, more difficult if employees are told they have to go back into lockdown again? Obviously, it is going to be prudent to ensure that the employer has laid in sufficient business supplies for a further lockdown period to ensure that staff can continue to work from home as efficiently as possible.

Finally, in terms of planning for the relaxation of lockdown arrangements and the resumption of more normal business life, we think employers should be looking carefully at the work they are requiring employees to do. An annual cycle may have grown up as a matter of tradition, rather than business necessity. Is there a genuine business requirement that the business needs to undertake its staff review in May or is it simply that there has always been a staff review in May? Do promotion rounds have to take place at the end of the calendar year or can the work involved in that be deferred for six months without doing undue harm and freeing up appropriate resources?

05.

COMMUNICATION, COMMUNICATION, COMMUNICATION

It is noteworthy how many times in the above sections of the article we have referred to the need to communicate effectively. We think this is really at the heart of an effective return to work, after the employer has done the necessary analysis of its long term decisions affecting staff and any transitional ones. Employers have a duty to consult with staff over matters of health and safety, and clearly a return to work raises such issues. Employers looking at permanent pay cuts, headcount reductions, or enforced alterations to contracts also need to go through a consultation process and, very probably, for any wholesale changes, this will have to be a collective consultation process with either a recognised Trade Union or elected employee representative. We think, in general terms, employers should recognise that staff consultation is pretty much essential in these challenging times. It will bring benefits to employers as being an effective route of communication to staff. Equally, with the support of a staff committee, employers will benefit. A staff committee signing off on an unpopular decision may be worth its weight in gold to the employer in getting staff to accept the decision but also in defending the employer against legal challenges.

We think that employers who do not have standing employee consultation committees should look now at setting these up. It can be set up as a temporary body to deal with challenges in 2020, for example, if the employer did not wish to go all the way down the road to setting up a freestanding permanent employee representative committee. Staff should be encouraged to stand for this. They could have an initial meeting during any working from home period very easily. We are all now increasingly used to working from home, using video call technology, and there is no reason why this could not work for initial consultations. Either way, the arrangements made to set it up should ensure that it could be used as a consultation body to discharge any statutory consultation duties such as collective redundancies or transfers under the Transfer of Undertakings Regulations.

We think that such a staff body should be treated by the employer as a valuable resource and invited to contribute comments and thoughts on the employer's plans or it could be used for matters where consultation is legally required, e.g. redundancies and other enforced adverse changes. However, we think that an employer may benefit too by adopting a genuinely collaborative approach. This will, for example, enable the employer to achieve buy-in where it is looking to

alter working practices which may have gone unchanged for years. Equally, it will enable the employer to gather appropriate commentary on experiences, suggestions etc. through the staff committee. One suggestion which we have seen is that staff should be surveyed shortly after their return to work or in the week leading up to it for their views on how the company has handled the working from home process, what could be done better, what worked well etc. A staff committee could be involved in reviewing the results of that for their input.

Equally, the communications programme directly to staff is vital. A staff committee could never be an alternative to such a programme. The employer will probably need to recognise that some communications will need to be companywide, but others may need to be targeted to particular groups of employees. For example, the process of reintegrating furloughed staff is potentially going to be different from the process for those staff who have worked throughout the period of the virus but who are now being asked to simply carry on working but in a new location, i.e. an office or other employer location. Staff who have been furloughed may well feel that they have limited prospects at the company. However the employer has positioned it when furloughing them, staff who have been furloughed may feel that they are seen as less essential or indeed are viewed as being of a lower calibre than staff doing similar jobs who were retained and worked throughout. If the employer is not looking to shed such staff through headcount reduction, then the employer will need to pay additional attention to those staff to ensure they are feeling respected and valued after ending their furlough. Those who have worked throughout, without taking any holiday, will not want to feel that, on top of the injustice of that fact, furloughed staff are being treated more easily. Like so many things, it will be a balancing act. However, asking furloughed staff in particular for their experiences of how the furlough process worked and how the employer could support them during any future period of furlough will be a key part of that.

Finally, we think the employer should be very clear that it will be liaising with medical experts and other respected sources to ensure that it is keeping an eye on the wider health position. With so much misinformation flying around about the coronavirus, employees can easily get lost in a blizzard of information. There will no doubt be anxious days, especially in the initial stages of a return to work, to see whether the virus is returning to pre-lockdown levels. The employer can assure employees that it will be monitoring the position closely, and it will make regular announcements as to how the return to work is going and whether any health issues are becoming apparent and that at all times the health and safety of its workforce is a paramount concern.



Employers who do not have standing employee consultation committees should look now at setting these up.

06.

WHAT ARE THE LIKELY ISSUES FOR INDIVIDUAL EMPLOYEES?

So far in this note we have spoken about issues in general affecting employers and transitional arrangements vs permanent arrangements. However, it is a certainty that individual employees will raise matters affecting them individually, or which may affect only a group of individuals but not others. It is impossible to predict all of these issues but we think that some of the following are likely to be raised with employers who should be thinking about how they will handle such issues now, rather than waiting for the issue to arise.

WHAT DO I DO WITH EMPLOYEES WHO ARE SHIELDING?

Until such time as the medical advice changes, shielded employees will presumably continue to shield. If the Furlough Scheme has ended, then such employees will, we assume, continue to be viewed as qualifying for statutory sick pay. We anticipate that most employers will, in those circumstances, treat them as qualifying for company sick pay for the balance of the shielded period.

WHAT ABOUT EMPLOYEES WHO ARE CONCERNED ABOUT EITHER THEIR PERSONAL HEALTH OR THE HEALTH OF ANOTHER WITHIN THEIR HOME TO TRAVEL TO AND ATTEND WORK?

If the individual is not shielding and is not themselves sick, then in normal circumstances, it would be a legitimate instruction to require the employee to attend work in line with their normal working schedule. However, these are not normal circumstances. Employers will need to be measured in handling such issues. On the one hand, forcing individuals to return to work, who are expressing genuine concern, however ill founded, is counterproductive. After all, such individuals can probably, if their level of concern is high enough, have themselves signed off as absent by reason of ill health caused through, for example, mental health issues such as stress and anxiety. Conversely, employers will want to ensure that for others who may share similar concerns but who are making an effort to return to work, the employer is doing everything to treat everyone fairly.

The employee's legal rights may be highly relevant to this issue. For example, an employer who has an individual who has underlying health conditions, may find that it is under an obligation to make a reasonable adjustment for that individual if they are disabled. If the individual wishes to work from home, rather than travel into the office, this may well be viewed as a reasonable adjustment particularly if it was for a relatively short term. An employee who cannot work from home but who is saying they are afraid to travel into work, may need to be encouraged to be more realistic or the employer may wish to find an alternative role for them, or consider, for example, or a period of unpaid or lower paid leave for a short period, until the position becomes clearer.

We also think it is highly likely that some individuals may well try to argue that the employer will be acting in breach of its health and safety obligations by requiring employees to travel in, say using public transport, or being required to come in to a work location and work in a crowded environment. We covered this issue in our [earlier guidance](#).

If the employer is left with no option but to discipline an individual for not attending work, then we think it would be very important to distinguish between the fact that the employee is asserting the employer has no right to make them attend work, from the disciplinary action. In other words, a distinction will need to be drawn between the employee's right to voice the view that they should not have to attend work and the manifestation of it (i.e. they are not actually attending work). This should also steer an employer around any complexities if the employee tries to claim that they are expressing a philosophical belief, i.e. a belief that there is an obligation on humans to live their lives in a way which is consistent with the lowest possible transmission rates of coronavirus (or a similarly expressed belief). The employer will need to be very clear that the employee is entitled to express that belief but this does not prevent the employee from being required to attend work.

What is the employer going to do about employees who say that their childcare or eldercare arrangements have not yet resumed and so they are unable to return to work? Clearly, employers wish to be understanding, but there may well come a point where they have to draw the line. Identifying a policy that indicates that individuals who have such problems will need to have a discussion with their manager but will be given up to, say, five working days to resolve matters rather than the statutory two, might be appropriate. Obviously, the employer will be mindful that an employee may simply require a period of parental leave if they have children who qualify under the scheme, in order to ensure that their childcare or eldercare arrangements can continue until appropriate alternative arrangements are put in place.



Employers are probably going to have to get used to challenges arising within the workforce and more vulnerable employees demand a greater degree of protection to guard against the greater risks they face.

Similarly, employers are probably going to have to get used to challenges arising within the workforce and more vulnerable employees demand a greater degree of protection to guard against the greater risks they face. To take just one example, what about an older employee who shares an office with a younger employee, and the younger employee is, as part of a formerly normal social life, going out to crowded environments etc., thereby increasing the risk of catching the virus? Can the older employee object/require to be moved? Given that some of the old social norms (an active social life) are no longer going to meet with unqualified approval from certain segments of the population, the employer is going to need to cope with a period of instability where the question of “what are you doing this weekend?” will be more loaded than at present.

Finally, one issue which we have already seen is whether the employer is obliged to tell employees if one of their colleagues has become ill with the virus, and if so, what can they say. This is not an easy question as the employer’s obligations to take care of the health and safety of its workforce are likely to conflict with the desire of individuals not to have sensitive personal data disclosed to their colleagues. It may be that individuals who are at risk of having been infected at work need to be given more information than those who simply work in the same premises. But we think the best way to address this is to discuss the issue with a staff committee and then deal with it in the abstract ahead of time, rather than when people are facing the news that one of their colleagues is ill and they are concerned for them and for themselves.

07.

CONCLUSION

As can be seen from the above, there are a myriad of issues which employers should be considering now. Attempting to consider all of the issues above in the wake of an announcement that lockdown will be ended and businesses starting to reopen would put the employer at a material disadvantage with the employers that are using the time now to plan for the next stage.

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