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ROADMAP TO REOPENING

THE TOP 5 QUESTIONS WE HAVE RECEIVED THIS WEEK: 22ND MAY 2020

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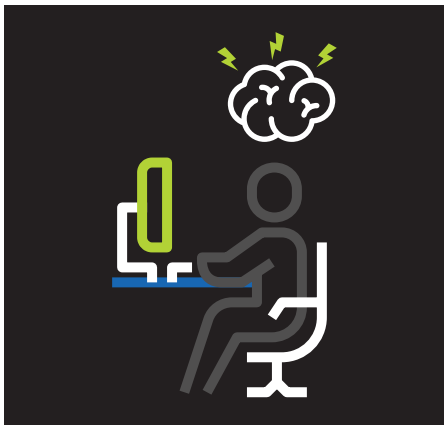
1. WHAT CAN EMPLOYERS DO IF AN EMPLOYEE ARGUES THAT RETURNING TO WORK POSES A SERIOUS AND IMMINENT THREAT TO THEIR HEALTH?



Employees cannot be subjected to any "detriment" where they refuse to return to work because of a serious and imminent threat to their health. This right to protection is equivalent to that for whistle-blowers.

If you can offer alternative arrangements - such as working from home - that are no less favourable in response to their concerns, there is no cause of action. There can also be no claim of an alleged detriment if you can demonstrate that there is no serious or imminent threat. But do bear in mind whistle-blower protection.

However, the employee could allege a detriment if, in response to a refusal to return to work, you placed the employee on furlough leave at reduced pay, unpaid leave or subjected them to disciplinary action. If an employee was dismissed on the grounds that they refused to work in these circumstances, this dismissal would be unfair.

Given that the Government imposed a lockdown based on a declaration of a serious and imminent threat, employers will need to explain why an employee's specific working conditions are sufficiently safe.

Communication is key. The more information you share with employees about the risk assessments you have conducted, the steps you have taken to create a "Covid safe" workplace, and the alternatives you have considered, the better.

EMPLOYMENT
Katie Glendinning, Senior associate
E: Katie.glendinning@penningtonslaw.com
T: +44 (0)1184 023 839

2. CAN AN EMPLOYER MAKE REDUNDANCIES DURING FURLOUGH?

The simple answer is yes but the employer will still need a genuine reason to make redundancies and will have to select fairly, consider suitable alternative employment, and consult.

It is worth noting that:

- Employers should not treat those on furlough as 'self-selecting' for redundancy. They should be considered with others who are performing similar roles but are still working.
- Individual consultation is necessary to avoid findings of unfair dismissal.
- There is no set minimum time for individual consultation but a week is the bare minimum and two or more weeks is strongly advisable.
- If an employer is proposing to make 20 or more redundancies at one establishment within a period of 90 days, then it will have to consult collectively with unions or staff representatives. The minimum consultation periods for collective consultation are 30 days for 20-99 redundancies and 45 days for 100 or more.
- The employer has to notify BEIS if there is a proposal to make 20 or more employees redundant. Failure to do so is a criminal offence.
- Failure to consult collectively can lead to a 'protective award' of up to 90 days' gross pay per employee.
- Consultation with employees and with representatives will not break furlough.

EMPLOYMENT
Paul Mander, Partner
E: Paul.mander@penningtonslaw.com
T: +44 (0)20 7457 3019

3. WILL THE IMMIGRATION COVID-19 CONCESSIONS BE EXTENDED BEYOND 31 MAY 2020? WHEN ARE THE QUARANTINE MEASURES LIKELY TO COME INTO EFFECT AND HOW WILL THEY IMPACT THE START DATE OF SPONSORED MIGRANTS?

The immigration team has received a number of enquiries about immigration concessions for those in the UK and the likely impact of quarantine measures on sponsored migrants due to arrive in the UK.

The Government has today, 22 May 2020, announced an extension to the Covid-19 immigration concessions that were due to end on 31 May 2020. These will now be in place until 31 July 2020. Those whose leave has already been extended to the 31 May 2020 do not need to do anything as their leave will automatically be extended to 31 July 2020. Those who have not obtained an extension and their leave expires before the 31 July 2020 will need to request an extension from the Coronavirus immigration team. Businesses and education providers should review the guidance and take action as necessary to preserve the immigration status of employees/students.

A date for quarantine measures is yet to be announced but they are likely to be in place from June. Those expecting sponsored migrants to be returning to work or study should allow for a two-week period before they can start if remote working or online study is not possible.

The following will apply to all UK arrivals with some limited exceptions:

- They will be required to self-isolate for 14 days.
- They will need to provide a residential address. If they do not have a confirmed address the Government will provide accommodation.
- While it will not be mandatory, they will be strongly encouraged to use the National Health Service contact tracing app.

It is anticipated that these measures will cause further disruption for travellers to the UK.

For further information please contact Pat Saini or Hazar El-Chamaa.

IMMIGRATION
Pat Saini, Partner
E: Pat.saini@penningtonslaw.com
T: +44 (0)20 7457 3117

4. I HAVE SENT A STATUTORY DEMAND BUT MY CUSTOMER STILL WON'T PAY AND SAYS THAT I CANNOT ISSUE A WINDING-UP PETITION? IS THAT TRUE?

In short no, but it could soon be.

There are currently no restrictions on you issuing a petition to wind up a company. However, the draft legislation published on Wednesday, 20 May 2020 proposes a temporary suspension on winding-up petitions based on statutory demands served between 1 March and 30 June 2020 (or one month after the commencement of the new law).

If your statutory demand either pre-dates this or is against an individual rather than a company, you can ignore the proposed new law (as it is currently drafted).

While you could take a risk and issue a petition now (on the assumption the 21 day period has expired), the new law is intended to have retrospective effect, so you might find your petition is refused or deemed void. You should seek advice about whether you come within one of the exceptions. Careful drafting might mean you can issue a petition or identify a better strategy.

Alternatively, if you are not concerned about the dissipation of assets or the deterioration of the debtor's financial position, you could wait until after the temporary suspension is lifted. If you are concerned, then seek legal advice on how to protect your position.

INSOLVENCY
James Harrison, Senior associate
E: James.harrison@pennintonslaw.com
T: +44 (0)20 7753 7813

5. I CAN'T FULFIL MY CONTRACT AS AGREED, WHAT CAN I DO?

The lockdowns caused by Covid-19 across the world have severely disrupted just-in-time supply chains, as well as bilateral contracts causing difficulties in obtaining supplies, contract performance and breach. This has been exacerbated by reduced or non-existent demand, again due to lockdown or closure of a wide swathe of business sectors.

If you can fulfil your contract another way, you should seek to agree contractual variations covering time, description, volume of performance and price adjustments.

If you could fulfil it partially you might want to agree contractual variations, part suspension or termination of the obligations you cannot perform.

If you cannot fulfil the contract at all, you should check whether the contract provides relief, for instance through a force majeure clause which covers the event which has occurred. Force majeure suspends the contract and may allow termination if the circumstances extend beyond a given period. If the specific situation is not covered and you are not able to physically or legally perform the contract due to an event beyond your control, you might be able to claim frustration. It may be persuasive to cite the Cabinet Office guidance issued on 7 May 2020 asking parties to act responsibly and fairly on contractual performance issues and enforcement, preserving contracts and supply chain during the crisis.

CONTRACT DISPUTES
Phillip d'Costa, Partner
E: Phillip.DCosta@penningtonslaw.com
T: +44 (0)20 7457 3029

For a selection of briefings and practical guidance to help minimise risk in this period of uncertainty visit our coronavirus resource hub.
T: **+44 (0)20 7457 3000** E: **info@penningtonslaw.com**

The information contained in this Q&A is general in nature and is not intended to constitute legal advice.

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