

## Employment



### Retention of staff during the COVID-19 outbreak

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Developments in recent days have posed problems for large and small employers alike: how to pay and retain employees despite a severe drop-off in business. News reports have shown that this problem may be particularly acute and immediate in the travel and hospitality sectors. This article outlines practical options which employers and employees can take, often working together, to tackle such problems with the aims of safeguarding jobs and maintaining a fit and capable workforce.

### Financial assistance for employees - Guarantee Payments

There is some, limited, financial assistance available to employees fit and ready to work but whose employer cannot provide them with work. Guarantee payments under the Employment Rights Act 1996, Part III may be available to employees (but not “limb (b) workers”) affected by a diminution of relevant work, or any other occurrence affecting the normal working of the employer’s business. On any day where an employee would usually be required to carry out work but, due to a decrease in the requirements of the employer’s business or any other occurrence affecting the normal working of the business (which would cover the impact of COVID-19), an employee is entitled to be paid by his employer a “guarantee payment” for that day. The current rate of pay is £29 a day for five days in any three month period up to a maximum of £145. If an employee usually earns less than £29, the normal daily rate applies. In order to be entitled to a guarantee payment, the individual must have been employed for at least a month (including part-time employees), must make himself available for work, not unreasonably refuse alternative work and not have been laid off because of industrial action.

The employer may have its own guarantee pay scheme, which would usually be located in the contract of employment, with provision for more generous payments than the statutory scheme. Where the payment is higher than the statutory minimum, the higher amount will be payable to the employee but the statutory pay will not also be payable. A guarantee payment under ERA s 28 counts as “wages” (ERA s 27(1)(d)), so a failure to pay a statutory guarantee payment can amount to an unlawful deduction from wages, recoverable by an employee in the Employment Tribunal. A failure to pay a contractual guarantee payment is enforceable as a contractual debt, as well.

Given the restricted nature of guarantee payments, they do not provide a reliable long-term solution to an employee without work. Neither do they provide any assistance to those who do not have the status of “employee” and are therefore classified as “limb (b) workers”, or to those on zero-hour contracts where there is no obligation for the individual to be offered any work. Employers and staff may need other options for dealing with the sudden decrease in business.

### Options available to the employer

#### *Annual Leave*

Employers are entitled to require their workers to take annual leave at a particular time (Working Time Regulations 1998, reg 15). An employer may thus scale down its operations whilst ensuring its workers still receive their normal

holiday pay. This can therefore provide a short- to medium-term solution where there is a decrease in work. It may be of particular assistance in the current circumstances, where many businesses will be approaching the start of a new annual leave year on 1 April 2020. If an employer chooses this course of action it is required to provide workers with twice as many days' notice as the number of days of annual leave it wants the individual to take.

## ***Redeployment***

If one area of an employer's business is facing particular difficulty, it may be possible under an employee's or worker's contract, to redeploy into another role. This can provide a useful opportunity to focus on another area of the business or to resource a previously neglected project. The appropriate risk assessments and training must be put in place.

## ***Working from home***

Where possible, employees can be asked to work from home and where this is agreed between the employer and employee, the employee should receive normal pay. Employers are required to protect the health, safety and welfare of homeworkers who are employees and are responsible for any equipment supplied to them for that purpose. If employees are working from home employers should carry out a risk assessment of the work activities and take appropriate measures to reduce any associated risks, for example providing suitable working equipment for those with particular health requirements or disabilities. It may also be necessary to consider whether home working arrangements will comply with data protection requirements, for example whether work telephone calls are taken in a suitable location and whether data is encrypted or stored securely.

## ***Lay off/unpaid leave***

An employee's or worker's contract may entitle the employer to require the individual to take a period of unpaid leave at the employer's request. Enforcing a period of unpaid leave without an express entitlement is likely to amount to a breach of contract and, potentially, to a complaint of constructive unfair dismissal.

## ***Working together to find solutions***

An employer must consider the provisions of an employee's or worker's contract before deciding what course of action to take in circumstances where work and pay are unavailable or restricted. Parties might be able to agree a change to working arrangements, such as hours, which might result in a middle way allowing an employer to retain its workforce and an employee to retain the job and at least some pay. In the medium- to long-term this may help an employer avoid redundancies, and the associated disruption and cost.

It might be possible for an employer to agree changes to arrangements for particular workplaces and employees are likely to have suggestions. Trade unions may be able to provide invaluable support in this process, even if not formally recognised. Employers should act with some caution if they propose changes to contractual terms which have been collectively agreed by trade unions. The Trade Union and Labour Relations (Consolidation) Act 1992 s 145B prohibits offers being made directly to workers, the purpose or effect of which, if accepted, would mean that a contractual term that was governed by collective agreement would no longer be so governed. In practice, this means that employers need to work with trade unions to try and agree changes to collectively agreed terms and conditions.

## ***Supporting and managing the workforce***

Whilst, understandably, there is currently considerable focus on business continuity, employees will continue to face other issues that may impact their work, including other illnesses and bereavement. Clear and available line management and employee assistance programmes can also be particularly effective. Where there are current employee issues, such as disciplinary processes, grievances or conduct issues, employers should consider how they should be managed and any delay or changes should be communicated clearly and effectively.

Employees may question how their performance will be managed at a time when their workflow may have decreased or

they have been asked to undertake other, potentially less familiar, work. Employers may wish to consider amending employee's existing objectives or providing short-term goals so that expectations are managed appropriately.

## Conclusion

Retaining a productive and committed workforce is key to effective business continuity. The interests of the employer and the workforce lie in effective communication, flexibility and adaptability. Such an approach may alleviate some of the immediate practical and financial challenges facing employers and their workforces.

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*Authored with Alice Carse*