

Throgmorton – COVID-19: Lockdown and What Next – May Update

Q. We are now in the middle of May and our employees have taken virtually no holiday, we are worried about being able to run the business in the second half of the year, what are our options?

A. This is still the most frequent question we are hearing. You do have choices, we have set some of these out below:

1. You can ask employees to take some or all of their accrued leave, it is better for employee well-being for leave to be taken regularly, in any case;
2. If they have leave booked in and approved, you can refuse to cancel it. That feels a little harsh to us, so we'd recommend that you ask them to take half and cancel half;
3. Warn your workforce that it may be necessary to spread leave across the year in order to avert operational issues or refusal of holiday requests during peak business periods later in the year; and
4. The Government has advised that Working Time Directive requirements on taking leave will be relaxed. This means they don't need to utilise 4 weeks of leave plus 8 public holidays each year (under the Working Time Directive). This gives you a couple of choices either allow unlimited carry-over into 2021, allow the usual carry-over at year end, but pay employees for any excess leave in the last payroll of the year. Give employees the option to cash out some leave during the year, in the month(s) of their choosing.

Note that Employees who have been Furloughed may still take holiday as normal but need to be paid at 100%. Government guidance was issued on 14th May 2020 advising that employers may lawfully compel those on Furlough to take annual leave and providing guidance on how to ensure that you are doing this lawfully.

The guidance will also apply to those working from home and not on Furlough if you are seeking to compel them to take leave.

Q. What are other firms doing to keep employees engaged and providing support for those who live alone or are struggling with the lockdown?

A. Excuse the long answer but our clients have been very creative, and we're impressed with how much has been done to include colleagues and avoid feelings of loneliness and isolation taking hold.

The easiest action to take is to switch some of your emails to 'phone calls if you can, and then to think about switching some of those 'phone calls to video calls.

Because humans are essentially social creatures, seeing people face to face is proven to improve general well-being. The release of endorphins, dopamine, serotonin and oxytocin in the brain are all linked to feelings of happiness and improved mood. There are some good ways to boost these and activate those receptors in the brain:

- For an endorphin boost - encourage your employees to take regular exercise, working up a sweat will be key to releasing them. There are lots of free options such as Joe Wicks daily PE class (other classes hosted by aesthetically pleasing people are available). Otherwise encourage employees to get up from their desks and take a walk or cycle during daylight hours - getting outside for 30 minutes each day also help to produce vitamin D, essential for the maintenance of good bone density;
- For a Dopamine boost - this is linked to the reward centre of the brain and the sense of achievement gained in day to day activities. Setting work goals or even supporting social challenges such as Captain Tom's goal of raising money by walking around his garden, are good options; and
- For a Serotonin and Oxytocin boost - carry on doing your usual performance reviews, focussing where you can on positive reinforcement, as the best way to increase both is via improving self-confidence and building relationships of trust. The feeling that others have confidence in you, that you are trusted and valued is a good way to stimulate an increase.

Many of you have organised team calls, which are great but think about whether you could do something more social such as virtual drinks parties, quizzes, home scavenger hunts, silent disco, Gin/wine tasting sessions, online baking and cooking lessons. All of which will help your employees to feel more connected, and hopefully more engaged!

Q. The Coronavirus Job Retention Scheme Portal (CJRS) has been up and running for a nearly a month, have they sorted out the teething problems?

A. We have been quietly impressed by HMRC's ability to take a system and processes designed to collect taxes and switch it around to create a working portal for the CJRS grants. Initially they were swamped with claims and we believe that they may have throttled back the flow to allow them to process the peak volume but in the last few weeks it has been really reliable and swift.

The guidance documents have been updated to ensure that the employer and employee guides are consistent with each other and more aligned to the legal direction. We have found it to be straightforward to use, provided that you have all of the employee and company data, such as Government Gateway logins, Unique Taxpayer Reference (UTR), payroll and NI numbers.

The portal automatically logs you out after 30 minutes, so having all the data to hand when you make the application is important. For those of you with larger workforces, you can do the input in batches to avoid getting logged-off part-way through.

We have issued a longer and more in-depth note on Furlough which can be accessed [HERE](#).

Q. Our employee has demanded that we put them on Furlough because of anxiety over travel to work, we still have work to be done, what can we do?

A. Simply put both parties have to agree to a Furlough arrangement, and it is typically where there is no work available or the employee is prevented from fulfilling that work. Whether this employee is genuinely prevented from fulfilling the work is a complex consideration. If they have an underlying health condition, they will have had a '12 week' letter from their doctor, which should allow you to either put them onto sick leave or Furlough. If they are shielding due to living or caring for somebody who is identified as being vulnerable, then they should be placed on sick leave or Furlough for this reason.

If none of these reasons fit, perhaps seek a fit note to establish that their anxiety is sufficiently significant to prevent them from attending work. If not, you can put them onto unpaid leave, but maintaining benefits and accruing holiday during the period.

Health and safety law will be a consideration if they can demonstrate that there was a real and imminent danger to them, in attending work during lockdown.

Q. We have had to make redundancies, can we Furlough at the same time as notice?

A. Yes can put them straight onto Furlough, however Notice pay must be paid at 100% so ensure that you do that.

Q. We have been approached by an employee on notice to rescind notice and be re-engaged because their new job has fallen through, what are our obligations?

A. This seems to be the approach that is espoused by radio broadcasters. It feels unfair to us, that the outgoing employer is being asked to bear the costs of an employee who has already disengaged and resigned to join another firm. The Outgoing employer had NO obligation to agree to the employee rescinding their notice. If you have not put anyone else onto Furlough, and they are all working remotely, you would be treating them differently to colleagues. (Potentially advantageous as they will do no work but still receive 80% pay and all benefits). That is not available to any other employees and this could open you up to claims of unequal treatment.

There is no obligation upon you whatsoever to do this, and my advice would be that you should not do this as it would reset the contract of employment between you and result in the following:

1. Contract restarts. The terms have to be equitable with the existing terms. Noting that if you Furlough, they may only get 80% up to the £2500 PCM cap;
2. HMRC may reject the grant application for Furlough costs, as the point of Furlough is to avert layoffs where work is no longer available and if it was a resignation it may not be true that work is unavailable;
3. If you Furlough but nobody else and 7. occurs, they may then seek to engineer an inequality of treatment claim to seek backdated compensation at 100% of the contracted rate;

4. You will have to pay for all benefits;
5. They will continue to accrue more holiday even though not working for you;
6. The notice period will be re-instated, and you might have to pay notice again when they leave employment next time. Remember notice is paid at 100% not 80%;
7. If they choose not to resign immediately, post-lockdown you might have to consider making them redundant, at your cost;
8. Whilst it is natural to feel empathy, they chose to resign and have potentially got the ability seek compensation for the breach of contract from their new employer;
9. Bending the Furlough scheme rules somewhat because the re-contracting process is not genuine, and nor is the subsequent Furlough could result in the grant being rejected; and
10. However, if you value the employee and have work for them to do, it may be worth re-engaging them, they might experience a surge of gratitude that will boost their engagement.

Q. When we come out of lockdown, how do we do that, and can we choose who comes back into the office first?

A. Slowly and with proper risk assessment! We can help you with a template document to consider your risks and ensure that returning employees understand their obligations and sign up to them. If you are an HR client email us, hr@throgmorton.co.uk we will provide this template free of charge.

We recommend that you start to build a plan for phased return to work, it could be hugely disruptive to have everyone return to work on the same day, or during the same week.

We have been told to expect schools and nurseries outside of London to re-open first, they are likely to phase the return of pupils to ensure that they can still adopt some social distancing practices. Your employee's ability to return to your business premises may be governed by their local childcare arrangements. We would encourage you to take a flexible approach to employees with caring responsibilities, ask everyone to tell you what their preferences are, and try to work with those.

You may also have to manage those with heightened anxiety over travel with care and empathy.

We also note that even when the lockdown period is over, people will still contract the virus and may have to return to self-isolation again.

There is still a reduced travel service in place in the early days after lockdown is lifted and this may cause significant frustrations for your employees.

You may want to bring back a couple of employees first to get the office ready, making sure that cleaning providers are scheduled to do a deep clean and that drinks machines and fridges are properly re-stocked and ready to cater for your employees. You could think about doing an all-hands welcome back breakfast or organising a lunch or other social event (with proper social distancing rules in place) to remind everyone what a great place they work in!

You may want to open up a dialogue early and ask employees to consider using some of their accrued holiday whilst you get back up to full speed.

Be aware that you should have a fair and transparent approach to avoid allegations of unequal treatment.

Q. When we bring people back what can we do, to make it easier and safer for them to come into the office. Can we provide taxis or parking or accommodation?

A. This is more of a tax question, so we enlisted our Head of Tax, Jon Hanifan to assist us with some guidance. The government recently issued some updated guidance on how to treat atypical work expenses: <https://www.gov.uk/guidance/how-to-treat-certain-expenses-and-benefits-provided-to-employees-during-coronavirus-covid-19>

In brief summary, an employer may provide parking close to or at the workplace at their cost, without triggering a taxable benefit for the employee. There is an exception to this rule if the employer seeks to be reimbursed for the parking cost via salary sacrifice.

Unfortunately, accommodation or taxis to and from the workplace and home will still be considered to be taxable benefits and should be reported accordingly.

If you need further information please do not hesitate to get in touch with your usual Throgmorton contact or **Lauri Cox** at lauri.cox@throgmorton.co.uk.