



May 2021 Update

Welcome to this month's update - where we discuss the latest legislation and guidance.

In this month's edition, we report on:

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 - Considering Redundancies when the Furlough scheme ends
 - Disciplining staff for misconduct outside the workplace
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Right to Work Checks

Temporary changes for employers carrying out right to work checks during the coronavirus pandemic that were put into effect on 30 March 2020 will remain in place until 20 June 2021. Therefore, checks can still be carried out over video calls until this date.

Job applicants and existing workers are able to send scanned documents or a photo of the documents by email or a mobile app, rather than sending the originals. If a prospective or existing employee cannot provide the required documents, then employers should use the Employer Checking Service.

Checks are still necessary and you must check the documents set out in the guidance, 'Right to work checks: an employer's guide', or use the online right to work checking service. It is an offence to knowingly employ anyone who does not have the right to work in the UK.

The process to check the documents involves:

1. Asking the worker to send a scanned copy or photo of their original documents by email or using a mobile app
2. Ask the worker to hold up the original documents to the camera and check them against the digital copy of the documents in a video call
3. Note the date you made the check and mark it as “adjusted check undertaken on [insert date] due to COVID-19
4. If the worker has a current Biometric Residence Permit/Residence Card or has the right status under the EU Settlement Scheme or points-based immigration system the employer is able to use the online right to work checking service during the video call.

When these temporary adjustments end, from 21 June 2021 you must either:

1. Check the applicant’s original documents
2. Or check the applicant’s right to work online, if they have given you their share code

Retrospective checks

It is not necessary to carry out retrospective checks on those who had a COVID-19 adjusted check between 30 March 2020 and 20 June 2021.

If the job applicant or worker can't show their documents, you must contact the Home Office Employer Checking Service to obtain a ‘Positive Verification Notice’, if they have a right to work. This gives employers a statutory excuse for 6 months from the date in the notice.

Employers: Make sure that have right to work checks in place for current and new employees and workers.

Contact us: For specialist HR advice and guidance, including contracts of employment and policies

Considering redundancies when the Furlough scheme ends

The flexible furlough scheme has been operating since 1 November 2020 and is due to end on 30 September 2021. Once the scheme ends, it is anticipated there will be increased redundancies across many sectors. The percentage on furlough leave has risen between October 2020 and January 2021 and extending the scheme has enabled employers to avoid additional redundancies so far.

What do employers need to know when planning redundancies after furlough?

Since July 2020, government guidance has been clear that an employee who is made redundant while on or returning from furlough is entitled to a statutory redundancy payment if they have two years' continuous employment including notice pay. The redundancy payment must be calculated using their normal wage (i.e. their pre-furlough salary). The change from the 1 December 2020 is that employers can no longer use the job retention scheme to pay the notice period.

What pay should be paid during contractual notice periods if an employee is on furlough leave?

There is a weird quirk in employment legislation, which allows an employer to pay the furlough leave payment amount if an employee's contract entitles them to more notice than the statutory minimum notice period. To break it down:

1. If an employee is entitled to the statutory minimum notice period only, the employer must pay 100 per cent of the employee's normal pay to cover their notice period; but
2. If the notice period in the employment contract is at least one week more than the statutory minimum notice period, the employer is able to pay an employee their reduced furlough rate of pay during their notice period.

Before considering redundancies, it is vital to consider alternatives, such as recruitment freezes, redeployment, delaying wage increases, not paying a discretionary bonus or terminating temporary employees' contracts.

Employers: Think about what strategies to implement before considering redundancies where possible.

Contact us: We can help your business with reviews of staff structures, cost cutting measures and redundancy procedures and consultation.

Disciplining staff for misconduct outside the workplace

We are often asked can we discipline staff for misconduct that occurred outside the workplace? It depends. An employers need to show the individual's behaviour affected the organisation's reputation or their colleagues.

If there is an allegation of misconduct against an employee in the workplace, it is usually clear whether a disciplinary investigation needs to be carried out. Although if the misconduct has taken place outside the workplace, it is difficult to know whether an employer has the right to initiate disciplinary proceedings.

However, there may be occasions when there is an overlap between the employee's private life and their employment, it is not clear cut. This could be the case if the employee's behaviour outside work affected colleagues or if they used company property to commit misconduct.

Risk to a company's reputation, as well as a loss of trust in the employee's ability to do their job may also be factors. If the employer is regulated, then any criminal proceedings may directly affect the organisation.

The recent Employment Appeal Tribunal (EAT) case of *K v L (UKEATS/0014/18)*, is one such example of this overlap, where a teacher was dismissed for having indecent images on his home computer. The EAT found the dismissal was unfair on the basis that the allegation of reputational risk had not been put to the employee properly. By not giving sufficient notice of this they did not have the opportunity to address it at the disciplinary.

The point that is particularly relevant to misconduct outside the workplace is that employers must clearly set out all the allegations against an employee properly right at the start of any disciplinary proceedings, including reputational risk. For alleged misconduct outside the workplace, employers may not be able to fully investigate the misconduct, so it is therefore important to explain and investigate the overlap between the alleged misconduct and the employee's employment.

In setting out clearly all the allegations, employers can potentially avoid being put in the awkward position of being unable to take any action (despite harm being caused), if the misconduct allegations themselves cannot be investigated properly or upheld.

Employers: Connecting factors such as reputational damage or using work property for personal use may be sufficient grounds for disciplinary action as long as the employer puts these concerns clearly to the employee.

Contact us: We can assist with investigations, disciplinary, grievances and appeals

For more information or assistance Email: enquiries@employmentlawsupport.co.uk



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