SLAUGHTER AND MAY

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COVID-19 - EMPLOYMENT AND INCENTIVES ISSUES

19 March 2020

The COVID-19 pandemic has transformed the employment landscape in a matter of days. As employers strive to come to terms with the outbreak, what are the key issues they need to consider?

How do we deal with a downturn in business or workplace closure?

Many businesses (particularly in the travel, retail and hospitality sectors) have experienced sudden downturns in business and, in some cases, workplace closures. This presents employers with a number of options, including:

- **Lay-off**: This means that employees are given no work or pay for a period, for example until the worst of the pandemic passes and the business recovers. Some employers may have a contractual right to lay-off employees, otherwise there is a risk of lay-off in breach of contract. This may entitle employees to claim their lost wages, or treat themselves as constructively dismissed (although the latter option would be unattractive to most employees in the current climate).
- **Short-time working**: This is a form of partial lay-off where the employer maintains its operation on a reduced scale, e.g. on two out of five days. This gives rise to the same issues discussed in relation to lay-off above.
- **Redundancies**: This is potentially a more onerous and expensive process, particularly where collective consultation is required (i.e. 20 or more redundancies are proposed at one establishment in a period of 90 days or less). There may be some scope to truncate the process in the "special circumstances" of the COVID-19 outbreak, but this is likely to be of limited use to most companies. This option has the added disadvantage that it will take longer for the business to return to normal, unless it is able to quickly re-engage the workforce it needs.
- **Agreements with employees**: The most attractive option may be for employers to seek employees' agreement to a temporary period of unpaid leave, part-paid leave or part time working (particularly if employees are aware that the alternative is likely to be redundancy).

Who is entitled to sick pay?

One of the first responses to the COVID-19 crisis was to make changes to statutory sick pay (SSP). As a result, with effect from 13th March 2020, SSP is now payable:

- to employees who have contracted coronavirus;
- to employees who are self-isolating (in accordance with Public Health England's stay at home guidance, or having been in contact with someone who has contracted coronavirus). This is the case even if they are not showing symptoms, provided that they are unable to work from home

- (e.g. because they do not have the facilities, or because their job requires them to be on location);
- from the first day of absence, rather than the fourth day; and
- without the usual medical evidence (people who are advised to self-isolate for COVID-19 will soon be able to obtain an alternative to the fit note by contacting NHS 111).

SSP is however only available to employees and some casual workers who earn at least £118 per week. Self-employed and low-paid workers do not qualify.

Employers who offer enhanced sick pay should check their policies; if enhanced pay is linked to entitlement to SSP, they may need to extend entitlement to enhanced pay in the same way as outlined above.

Employees who are self-isolating, are not showing symptoms, and are able to work from home, should be encouraged to do so (they will not be entitled to SSP).

Employees who do not want to physically attend work (for fear of catching COVID-19) will also not be entitled to SSP, and should be encouraged to work from home if possible. Where this is not possible, the employer could require the employee either to take the time as annual leave, or as unpaid leave.

What about the closure of schools?

On 18th March, the UK government announced that state schools will close with effect from 23rd March (and it has asked that private schools and nurseries should also close). There will be an exception for the children of keyworkers and vulnerable children.

This will lead to issues for many working parents, who will be faced with trying to find other arrangements for childcare. The UK government has specifically advised parents not to leave children with elderly grandparents, who will be at greater risk if they contract COVID-19.

Employers will need to communicate with their employees in order to understand the likely impact of school closures. For some employees, it may be possible to work flexibly so as to fit their work commitments around childcare. If employees are able to work from home without their caring responsibilities impacting on their work, then they could do so (and they should continue to be paid in the usual way). For others, some period of absence from work will be necessary. There are a number of possible options, for example:

- **Time off for dependants:** Employees have a statutory right to take a "reasonable" amount of unpaid time off work to take "necessary" action to deal with illness or unexpected disruption in arrangements for the care of a dependant. This may apply equally to parents of school-age children, and employees with elderly or vulnerable dependants who are advised to self-isolate. The statutory scheme usually only allows for a few days off in order to make alternative arrangements, but this is likely to be tested in the context of COVID-19 where alternatives will be much harder to put in place. Employees may therefore be entitled to longer periods of absence than has previously been the case. It is unclear as yet whether the UK government will issue further guidance on this in the context of school closures.
- **Parental leave:** Employees with at least one year's qualifying service may also be able to take a period of unpaid parental leave (of up to four weeks per child in any 12 month period).

- **Other options:** Employees may use annual leave, or agree a further period of unpaid leave with their employer.

What other guidance is there for employers?

Public Health England has released (and is regularly updating) guidance for employers, which covers issues such as how to prevent the spread of the infection and what to do if someone with suspected or confirmed coronavirus has been in the workplace.

What about our incentives arrangements?

COVID-19 has the potential to impact on employees' share plans and incentive arrangements in a number of ways. Common issues being faced by UK-listed companies include:

- Companies may need to adjust performance conditions applicable to existing incentive awards to account for the impact of coronavirus on company performance and share price. The plan rules should be checked; they often allow amendments to performance conditions post-grant, provided that the amended conditions are not materially less challenging to satisfy. Companies will therefore need to consider carefully how to maintain an equivalent level of stretch in their performance conditions.
- Some companies may find themselves considering the option of paying employees in shares to deal with temporary cash flow issues. There are numerous practical issues for companies to consider in these circumstances, including:
  - how to obtain consent from employees for these new arrangements;
  - how to avoid the need for a prospectus or shareholder approval for the arrangements;
  - compliance with the company's directors' remuneration policy;
  - whether an existing employee share plan can be used to deliver the shares;
  - how to set up the arrangements so that they can continue to operate when the company goes into "close period"; and
  - how tax and social security contributions arising on the shares will be paid.
- Given the recent decline in global share prices triggered by coronavirus and its accompanying uncertainties, many companies have been grappling with the issue of whether current share prices reflect an accurate valuation and to what extent these prices can be used to strike the value of employee share awards robustly. Some shareholders have expressed concerns that executives who receive share awards calculated by reference to current share prices (over a markedly larger number of shares) will benefit disproportionately from any recovery to historically normal share price levels.

Whilst one potential course of action is simply to postpone the grant of awards, companies are also considering whether it is appropriate to scale back the number of shares subject to awards at the time of grant. Alternatively, Remuneration Committees may consider whether it is appropriate at vesting to use the discretion (now commonly found in long-term incentive plans following the implementation of the 2018 version of the UK Corporate Governance Code) to override the formulaic out-turn of awards, where it considers that executives have made "windfall gains" as a result of an exceptionally low share price at the time of grant.

If you would like further information about the impact of COVID-19 on your business, please speak to your usual Slaughter and May contact.

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