

Looking At Approaches Employers Might Adopt To Reduce The Impact Of Our Response To The Global Pandemic On Jobs

This is new ground for all of us, and we are learning on the job, as we adapt to new methods of social interaction and new ways to work. From an employment law perspective, though, many of the challenges we face now, are not so much 'new' as difficult to implement all at once: there is too much to do, too fast.

Flexible Working

Flexible working has evolved from exception to norm. Practical challenges are being overcome daily, from purchase of scanners, shredders, cameras, faster broadband and better furniture, to reorganisation of the working day, 'normal' practices and family life. Even the form of emails is evolving: a quick direction comes across very differently when sent by someone you have not seen for a week. There is more warmth in the communications being shared, along with more personal information (with all the attendant privacy risks). One silver lining is that we are in it together. Flexible working is no longer the preserve of globally mobile executives, business disrupters and working parents - and once we have all learned how to do it, it seems unlikely that the clock will turn back.

Flexible Working May Not Be Possible For Some

Of course, simply adapting to homeworking is not an option for many. How do you give your customer a haircut while staying distant, or run a pub when the pubs are closed? Some businesses have adapted, by applying the skills of existing employees in a different way, others have suspended work or implemented redundancies.

Redundancies, Pay Cuts And Changes To Terms

Across the World, implementation of redundancies and changes to contract terms is subject to 'mandatory' employment laws, including, typically, rules on consultation,

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giving notice, redundancy pay etc. These might be varied by local rules and/or emergency legislation but the challenges remain fairly familiar. Those operating cross-border will be aware of the risks of applying 'home' rules to people working in other places, for example:

- Consultation may be mandatory, with unexpectedly severe, potentially criminal, penalties for failing to comply – and penalties may apply to leaders personally, not just the business

- Consultation might be required at more than one level, e.g. individual, workplace, industry, regional or cross-border, and there may be a need to take care with the timing of each process
- Different rules may apply to different categories of worker (e.g. different rules may apply to company directors, senior managers, blue or white-collar workers)
- Laws may be applied by mandatory collective agreement, even where no trade union is recognised
- Sometimes dismissal may not be effective at all, e.g. where there are restrictions on dismissing particularly vulnerable employees, or in the absence of compliance with consultation rules – void dismissals can be very expensive
- The real costs of redundancies may not be apparent if enquiries are not made thoroughly – sometimes apparently high costs are covered by central funds or earlier contributions, in other cases there may be unexpected requirements for very substantial payments
- There may be restrictions on who or how dismissals can be implemented and/or on rehiring
- There may be a requirement to negotiate a 'social plan' beyond the bare minimum of legal payments, and the cost of failing to do so may not be immediately apparent
- In many places 'mandatory' means just that – and there is no easy option of paying 'extra' to avoid time-consuming processes. The key here is not only to check the local rules but to make sure the up-to-date rules are checked, and re-checked, and that questions are asked about local practices and expectations, as well as the law.

Alternatives To Redundancy

Many of the strategies that are adopted to avoid redundancies (and reduce costs that might otherwise lead to redundancies) are 'common-sense' or frequently adopted. These might include, e.g.:

- Withdrawing job offers
- 'Freezing' recruitment

- Offering early retirement/pension or an opportunity for employees to volunteer for redundancy
- Reducing, pausing accrual or deferring payment of remuneration, either by individual or collective agreement
- Taking holiday or allowing 'purchase' of additional holiday
- Changing hours or changing terms (e.g. duties or where an employee works)
- Job-sharing
- Introducing annualised, banked or other flexible hours schemes so that the work can be done at another time for the same pay
- Lay-off, short-term or 'furlough' arrangements
- Temporary release to other employers.

Many of these arrangements are subject to complex employment laws that have historically sought to protect employees from 'abuse'. For example, typically, express individual consent is required for a pay-cut to be effective.

Public Support And Insurance Cover

In addition to these options, there may be various, direct or indirect, financial support options to consider, e.g. public funding of wages and incentives to retain staff who might otherwise be made redundant. The support offered may be very substantial indeed.

Discrimination, Communication And Common Decency

Whatever the processes that must be followed and decisions that may be made, there are some common principles that can make navigation of the legal minefield easier. Discrimination laws apply to all sorts of protected status that may be relevant in this context, e.g. age, disability, sex, family circumstances. Employers would do well to think hard about the potential disadvantages that established processes may create for particular categories of staff in our new World – assumptions (and prejudice) are evolving.

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Communication is also a challenge, where employees are at home communicating primarily by social media and live streaming, and there is limited scope for feedback. Public relations, impact on colleagues and a natural human desire to 'do the right thing', all have a potentially bigger part to play in current redundancy-related communications. Employers who do find themselves implementing redundancies would do well to go the extra mile to do the decent thing, not only because they might want to, but because legal and commercial consequences are likely to be far less severe if they do. At a time when employers need to trust and rely on the cooperation and support of staff, treating former colleagues well could be critical.



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Helen Elliott & Damian Porter
wish all our readers and clients
the very best over the next few weeks,
and hope you all stay safe and well.