



COVID 19 HOMEWORKING: A GUIDE FOR LAW FIRMS & LAWYERS

BY force rather than by choice, most lawyers are now working from home, and will be for at least the next three weeks. This situation may continue for longer, or may have to returned to for periods over the next 12 months. Arrangements to maintain a service that were initially taken as matter of urgency therefore tend to take on a somewhat different legal complexion.

This guide does not promise to have the answers to all the questions thrown up by the internal disruption being caused to law firms, but instead is aimed to be a prompt to look at the kind of matters law firms may want to consider as they head into the challenges of Week 3 in the new normal.

The structure is as follows:

- 1) Protecting welfare and promoting safety
- 2) Management of staff, client information and client expectations
- 3) Employment and payment issues.

1) PROTECTING WELFARE AND PROMOTING SAFETY

A) MENTAL WELFARE

Many lawyers and admin staff are now working from home for a prolonged period. Many are alone, many are not – they have children or partners sharing the same space. Either situation can generate anxiety at the best of times, even without the possibility of illness themselves or loved ones, and uncertainties regarding employment (see Section 3 below)

As employers therefore it would be reasonable to expect law firms to look at the following changes:

- do staff know who to contact should they require to discuss health concerns?
- should supervisors increasing the number of calls they make so that they can monitor welfare?
- do supervisors have any awareness of the signs of stress and anxiety to look for?
- are staff encouraged to speak to each other to provide support/reassurance?
- should social events such as through Skype/Zoom be arranged to discuss more general issues other than work?
- should an Employee Assistance Programme be arranged (in light of the reduced availability of the usual GP services)?
- should the services provided by mental health charities and their contact details or online guides be circulated to staff?

A balance of course has to be struck – employees may not wish to disclose their personal circumstances. Reassurance may need to be given that this information will be kept confidential and not used for any other purpose (which in a partnership or limited company may clash with general duties of disclosure to other partners/directors, so agreement should be reached in advance regarding this.)

For the avoidance of doubt, it may be safer to say that there is no obligation to answer questions of this personal nature– but that the employer is willing to offer support if this would be useful.

B) PHYSICAL WELFARE

Homeworking (it is hoped) will be low risk for the vast majority of employees. Nevertheless, some serious accidents or injuries at work, though at home, should still be reported to employers wherever they occur, and the requirement and method of doing so should be highlighted. (Regulations 4, 7 and 12 of the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013/1471).

The equipment (usually laptop) provided to allow home working should have come from a reputable supplier and not be of such vintage as to pose a fire risk.

Even though employees are working from home, First Aid Regulations still impose a duty on employers to ensure there are adequate facilities at home – usually that there is simply a basic first-aid kit on the premises.

But if the employee has a disability, the duty may be greater in terms of providing equipment to overcome the disability and to allow them to carry out their job effectively. If an employee has non-physical adjustments, for example, changes to hours, it should be made clear that these hours will continue at home, and they should not expect to answer calls, emails outwith these times, just because they are working from home.

A common danger for employers under the Equality Act can be that assumptions are made about homeworking arrangements – to avoid that, questions should always be asked.

A check whether employees have any problems with equipment generally is useful for another reason - given the obvious uncertainties regarding future job losses, any perceived deficiencies should be flushed out before they are relied on in any arguments about performance as a basis for redundancy (Section 3 below).

Even aside from the possible fire risk or tripping over the power cable, laptops are not risk-free. The HSE guidance is that employees using them for prolonged periods should be advised to:

- break up long spells of screen time with rest breaks (at least 5 minutes every hour) or change in activity;

- avoiding sitting in awkward, static postures;

- getting up and moving or doing stretching exercises.

Your workplace liability insurers may wish you to go further - the importance of the employer assessing risk was made clear by the Supreme Court in *Kennedy v Cordia* [2016], the well-known Glasgow case. Where the work is being undertaken in a 'novel manner', a creative PI lawyer could argue that there is all the more reason for an assessment to be made.

C) LENDERS & LANDLORDS

Some employees will have conditions in mortgage agreements and tenancy agreements prohibiting them from using their accommodation for business purposes without prior permission. It is important that employees are therefore asked to check the terms of their lease or mortgage agreements, and to provide vouching that they have authority to do so, even for the duration of the lockdown. Employees should also try and obtain from their home insurer confirmation of cover in case they damage work equipment – if extra cover is required, will the employer meet the cost? Or will the employers' insurance cover losses caused by an accident at home?

2) MANAGEMENT OF STAFF, CLIENT INFORMATION, CLIENT EXPECTATIONS

A) STAFF

As well as an opportunity to observe general well-being, the typical office also allows for performance to be measured in various different ways – hearing what colleagues say, seeing incoming calls and mail, generally counting the number of coffee breaks/cigarette breaks/trips to the bathroom. When all this goes on behind closed doors, other methods of measuring performance clearly come into greater focus.

Most lawyers account for their time, and when this is done by digital means there is no immediate issue – similarly, where there are digital files, then administration can still be done and observed to be done. The courts and prisons are stepping up use of video-conferencing, and for client meetings this provides a risk-free way of the work progressing. The diary can still be populated to an extent (even though many hearings will be extremely notional ones for a few weeks at least).

But the lack of functioning businesses is inevitably going to result in a reduction in incoming business in most areas of law. So what should the lawyers be expected to be doing in the meantime, and how can administration help with this?

Uncertainties on both sides can lead to the familiar issue of junk data being generated purely for timesheet purposes, generating frustration for supervising lawyers, and the risk of a potential outcry from clients if the times make their way onto invoices. An open dialogue and the setting of clear, but realistic expectations and deadlines for work being done from home might help save much angst.

That may be bound to generate a discussion of home life – it may be that employee has caring responsibilities, or a partner who is still at work, and it's simply not going to be practical to expect the same level of output as there would be in the office. Yes there are childcare facilities potentially available, but the employee may make a judgement that they do not wish to increase the risk of exposure. These are judgements that an employer would be on dangerous ground if it attempted to overrule - you don't have to be an expert in employment law to see that future Employment Tribunals will be more sympathetic to employees in this type of situation, than their employers.

A regular routine has been recommended by many sources during the lockdown as the most healthy way to adapt and it may be that staff and managers both benefit from knowing when they can be expected to report and - probably just as important, when they are not expected - to answer the phone or respond to emails.

B) CLIENT INFORMATION

The blurring of the workplace and the home also risks the kind of casual discussion with family members that led in 2012 to the secret of JK Rowling's creation being able to leak from her lawyer, via his wife, to a friend who had a friend, who happened to work for a newspaper, leading to substantial embarrassment, loss of a good client, and a £1000 fine from the regulator.

Employees in some firms have asked staff to mute or shut off entirely smart speakers like Alexa (Amazon) or Siri (Apple) to protect work-sensitive data while working remotely, due to the risk of confidential client information coming into the public domain through these devices.

Inevitably, the Covid crisis has also been the starting gun for a range of online attacks by cyber-criminals, including:

- Phishing attacks where, malicious emails have purported to provide important government or regulatory guidance on new developments,
- Spear-phishing attacks which have purported to be communications from colleagues or clients to those working at home,
- Fake websites purporting to provide medical or other virus-related advice (such as a fake website copying the John Hopkins Coronavirus Resource Centre).

The majority of reported incidents involve the use of malware or social engineering techniques to trick users into downloading ransomware and/or compromising login credentials. The extent to which more sophisticated groups may be exploiting the current turmoil remains to be seen.

While law firms may have been diligent in ensuring the equipment staff are given to work from home with is fully protected, it's certain that the move to home working will increase the vulnerability of internal systems. Staff therefore should be given a run-down on the type of things not to open, or to click onto when browsing for non-work reasons (e.g, social media). IT support may be harder to come by than usual, so perhaps cannot be relied upon to flag up concerns – and routine tasks such as patching up gaps may be missed. Should staff not agree to any updates unless pre-warned of them?

But the legal issues arising from data breaches remain the same, namely:

- data protection and other regulatory risk arising from loss of personal data;
- privacy claims brought by data subjects; and
- commercial disputes with customers and/or third-party service providers regarding responsibility for incidents.

It would be useful for staff to be reminded of their confidentiality obligations generally and data protection specifically – an online training video or similar may be the easiest way to do this.

The Information Commissioner's Office (ICO) has issued guidance that they are prepared to be pragmatic and provide businesses with some latitude in terms of GDPR breaches, in the

current situation. But the ICO will still expect businesses to demonstrate they are well-managed, have considered the risks, and attempted to make the appropriate technical and organisational measures, in assessing any incident.

The rules are not relaxed about the reporting of data breaches – the 72-hour deadline remains for notifying a data breach, although the ICO have said they will exercise discretion not to penalize companies who show they have a good reason for delay. But a relaxation of security standards due to homeworking is a weak defence to the ICO, as it would be to any complaint to the regulator.

C) CLIENT EXPECTATIONS

At the same time as being concerned about future business, there may also be an issue in complying with contractual obligations, for example if staff are simply unable to work.

You may also wish to amend the price for providing the same level of service, given the disruption to the business. The contract is the first place to check – is there a ‘Force majeure’ clause? The outbreak is clearly outwith anyone’s contemplation when the contract was formed. It may allow the affected party to suspend their contractual obligations for a certain time or even cancel a contract altogether.

Frustration is another possible remedy – it is a term that tends to be implied by law rather than stated, if it is simply now impossible to provide the service contracted. However, there may be specific notification requirements in the event of this, or steps you should take to mitigate any losses, or the other side may be able to seek damages.

3) EMPLOYMENT AND PAYMENT ISSUES

1) RETAINING STAFF

The intervention of the Chancellor of the Exchequer on the March 23rd, with the announcement of the Coronavirus Job Retention Scheme, is the biggest change to the landscape of UK Employment law since introduction of the Equal Pay Act in 1970.

Without it, by now the choices for law firms by now could well have become quite stark – do we instigate a lay-off, or do we go further and make redundancies? The uncertain duration of the crisis meant the existing rules for use of lay-off would have led to a lot of complicated decision-making. The employer is under a duty to make redundancy payments if the lay-off lasts for four weeks in a row, or any six weeks out of any 13-weeks period. The aim of the rules was to prevent abuse of lay-off, but their application in this scenario may have ended up sacrificing jobs which otherwise could have remained open.

In a legal sense, if not a human one, the issue of redundancy is relatively straightforward, as the test under the Employment Rights Act 1996 is not a high hurdle – “the needs of the business for employees to carry out work of a particular kind cease or diminish, or the needs of the business for employees to carry out work of a particular kind in the place where the employee was employed cease or diminish, are expected to cease or diminish.”

In most areas of practice (with the possible exception, sadly, of private client), this is mark that is going to be hit. The ERA also has complex rules regarding identification of the need for redundancy of particular skill-sets, or 'pooling', but the way in which lawyers tend to specialise in practice areas makes this easier to do than in other lines of work.

However, the introduction of the 'furlough' by the Chancellor has provided the employer with Government-funded alternative to redundancy – allowing the legal skills to be retained while the financial impact is mitigated, and without the requirement for the employer to have to foot redundancy payments.

Furlough means a leave of absence from work - although it comes from the Dutch word 'verlof', it is an import from the US, where it has been used to describe federal employees, who were not paid during frequent disputes within the federal government. The scheme did not require the ERA to be amended to accommodate it as essentially is a variation of contract between employer and employee to recognise a temporary situation.

The employees retain their status, but the employer doesn't have to pay them. It's not mandatory, so the employer doesn't have to take part, but if they do, the Government will pay 80% of their salary in the form of grant (so it doesn't have to be paid back) for the duration of the furlough.

The maximum that can be claimed as a reimbursement is £2500 plus employer's NICs and minimum pension contributions. It's up to the employer if they pay the balance of 20%. An important factor in this decision will be whether the employer has others working for them and not furloughed – they will be paid 100% as normal, so it may cause disruption to internal relations if those furloughed are getting the same.

The payments are going to be through an HMRC portal which is not going to be ready until at least the end of April. When it is ready however it will backdate payments to 1st March. In the meantime, in essence the employer has to fund the wages as a debt which can then be repaid.

The Government has stressed that it is a condition of the funding that they will have the right to audit the grant – and they insist that nobody who is paid under the furlough does any work. That could create some practical difficulties. If there is some work (e.g. new clients in a particular area of law), but not as much as usual, the employer has to decide between asking staff to do a reduced amount of work, and furlough. It cannot do both. It cannot ask the staff to service the reduced number of new client inquiries, or court appearances, and reduce their pay to represent the reduced amount of work being done, and seek to 'top up' the wages to 80% using the Scheme.

So what might seem to be the fairest thing to do – divide the work equally between all employees – becomes problematic if an application is going to be made to the Scheme. Instead, it makes more sense for a particular department, or class or category of employee, furloughed, and others kept fully occupied. But what if there are then new inquiries about an area of law in a department that has been furloughed?

One answer could be rotation – the Scheme says furlough has to apply for a minimum of 3 weeks, but there are no rules against taking people out of furlough for periods and putting them back in again, if it comes to it. That does involve a degree of forward planning, and the problem with that is that things could change for the employee – a family member may become ill, which would complicate previous 'rota' commitments at short notice.

In short, attempting to match the anticipated level of client service required, with a commensurate reduction in the wages being paid, is undoubtedly helped by the Scheme, but the implementation is not without difficulties.

Faced with this complexity, there may be employers who decide that making redundancies is still something they want to do – but the key difference the introduction of the Scheme makes is that these employers are likely to face an argument at the Employment Tribunal that the dismissal was unfair, because furlough presented a reasonable alternative to redundancy.

In general employment law does not let the ET get involved in telling an employer how to run his business. However, the offer of the Government paying 80% of wages rather than terminating the role would be something that an employer would be expected to show that they had at least considered, and there was a degree of justification in not taking it up.

There will no doubt be test cases on this argument, but with the ET system currently coming to grips with the situation itself by trying to get remote hearings up and running, any judicial authority is some way off.

2) OTHER PAYMENTS

If employees need to buy new equipment to work from home properly for a long period, they will be entitled to be reimbursed these expenses. Employers can make tax free payments to employees for certain costs associated with homeworking in certain circumstances, but it's advisable to flag up that there can tax implications if abused. HMRC rules say the item has to have the 'sole purpose' of enabling performance of employment – fortunately they have issued guidance that 'private use' of computer devices at home does not invalidate this, and the same for internet connection and mobile phone use.

HMRC will allow £4 per week to be paid to the employee for the expense of heating & lighting the homeworking area – if the sums paid rise above that figure, records will need to be submitted and an explanation as to why. The tax burden would fall on the employee, but the employer may wish to reach an agreement with the employee about this in case it develops into a dispute.

Tea, coffee and biscuits are not tax-deductable!

FURTHER ADVICE

This guide of course does not amount to legal advice, but if any is required, Livingstone Brown have a team of experienced employment lawyers ready to give advice and guidance on any work-related issues.

Being unable to meet clients just now has not stopped us giving advice – our lawyers are meeting with client by virtual means. Calls will be returned the same day. Call 0141-429-8166 or email info@livbrown.co.uk. Discretion is assured.