Cooley

Reducing Staff Costs in an Uncertain Economy

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The impact of COVID-19 on businesses in the UK is becoming increasingly apparent, causing many businesses to consider how they can reduce staff costs. This alert reviews the variety of measures that UK employers may consider to help manage business viability and continuity.

- **Freezes in hiring, promotions and/or transfers.** Initial consideration should be given to freezes on hiring, promotions and transfers. These can generate short-term staff cost savings and avoid the economic and morale costs of redundancies. However, freezes alone may be insufficient to address cash-flow and resource shortages, and delaying promotions may result in morale issues. This issue may be addressed in part by offering high-performing or valuable employees additional equity awards and/or a retention bonus. For new hires that have already accepted an offer of employment, to rescind the offer, the new hire would need to be given notice of termination in accordance with their contract.

- **Deferring or delaying discretionary noncontractual bonuses and/or salary increases.** Employers may also consider using their discretion to defer or delay any noncontractual payments. As noncontractual entitlements, these changes do not require an employee's agreement but should be communicated to employees.

- **Reduction of working hours or remuneration rate or asking employees to take unpaid leave.** Employers may consider reducing employee work hours and pay or asking employees to take a pay cut in order to reduce staff costs with a view to increasing compensation back to the original level again when business improves. Employers may also consider asking employees to take unpaid leave. These changes will, in most cases, require changes to the employee's terms and conditions of employment (i.e., their employment contract).

    - Changes to employees' terms and conditions can generally be made in the following ways:

      Seek agreement to the changes. As express agreement is an effective way to vary an employment contract, an employer can try to agree to amendments to hours or salary with their employees. Employees may accept such changes as an alternative to lay-offs or redundancies given the current climate, but employers must ensure that such an agreement is not made under duress. Any amendments should be confirmed in writing.

      If employees do not agree expressly in writing, an employer may still impose the changes but risks being in breach of contract unless the employees impliedly accept the changes through practice (i.e., continuing their employment on the amended terms). If an employer is in breach of contract, they would be unable to rely on contractual protections they may have, including protection of confidential information or any post-termination restrictions.

      Terminate existing contracts and re-engage employees on new terms and conditions. Where amendments cannot be agreed, an employer could force through changes by terminating and offering to re-engage their employees on new terms and conditions. However, where this proposal would affect 20 or more employees, statutory collective redundancy obligations will apply. In addition, there is a risk of employees bringing unfair dismissal claims if they have two or more years' continuous service. Employers should also provide appropriate notice (or make payments in lieu of notice) in order to avoid claims of wrongful dismissal.

- **Furlough leave under the Coronavirus Job Retention Scheme.** The UK Government has announced plans to set up the Coronavirus Job Retention Scheme as part of a package of temporary measures to support businesses amid the disruption caused by COVID-19. At present, details of the scheme are limited, but the announcement indicated that **all** UK businesses (regardless of size) will be eligible to participate.

    - A furlough involves stopping employees from working for a specified timeframe, with the intent to later reactivate their

employment. This effectively spreads the cost reductions over the larger workforce and ideally minimises attrition and the loss of key talent. A furlough offers some advantages over a lay-off or redundancy by providing short-term personnel cost savings without having to terminate employees. However, some employees may ultimately be forced to seek other employment, or, if facing financial difficulties, may prefer to receive a severance payment, where offered.

- UK employers will be able to apply to HMRC for a grant, which will reimburse 80% of the wage cost of employees who are designated as furloughed workers, up to a cap of £2,500 per month. Employers will be able to choose whether to top-up the wages of furloughed workers to their normal level.
- Information about furloughed workers and their wage costs must be submitted to HMRC through a new online portal, which is under development.
- The scheme will cover the cost of wages backdated to 1 March 2020. It is proposed to be available for at least three months, with a review at that time. The government expects to make grant payments by the end of April.
- We do not currently have clarity as to how the scheme will operate. For example, it is unclear how the term "furloughed workers" will be defined, but it is likely to mean employees who are retained in employment but placed on a leave of absence, and who would otherwise have been terminated for redundancy as a result of the COVID-19 disruption. It is also unclear whether employees who have already been terminated as a result of COVID-19 disruptions will be eligible for the scheme – there are reports that as long as the employees are brought back onto the workforce, they will be eligible to participate in the scheme, but no details have as yet been provided.
- We expect further details about the scheme to be published soon and will provide a separate alert on the scheme once possible to do so.

- **Statutory lay-offs and short-time working.** Under UK law, there are also two formal statutory provisions which deal with lay-offs (whereby the employer provides employees with no work and no pay for a period while retaining them as an employee) and short-time working (whereby an employer provides employees with less work and less than half a week's pay for a period while retaining them as an employee). Unlike a lay-off, short-time working does not involve a complete cessation of work. These are complex statutory concepts, but they could provide medium-term staff cost savings, although they should be considered in light of the potential to furlough employees pursuant to the scheme (described above).
  - The enforcement of these conditions is not automatic; an employer must have an express or implied contractual right to lay off or impose short-time working, and these clauses are uncommon outside of manual industries. If an employment contract does not provide for such rights, employers may wish to consult with employees and seek their express agreement. Under normal circumstances, agreement would be unlikely to be reached, but faced with closure and job losses, employees may agree to these measures.
  - If an employer seeks to lay off only some of its staff, it may be necessary to go through a selection process to determine which employees are to be laid off. Any such selection should be reasonable and based on similar, objective criteria to those used in a redundancy exercise.
  - In relation to short-time working, an employee's pay is reduced to less than half a week's pay, which is capped at the statutory maximum so would currently be less than £262.50 per week. If the employer provides a contractually guaranteed fall-back rate of pay that exceeds half a week's pay, an employee will not be subject to statutory short-time. However, any Statutory Guarantee Payments (see below) paid by the employer will not prevent an employee claiming to have been laid off or put on short-time because Statutory Guarantee Payments are not remuneration to which the employee is entitled under their contract.
  - Subject to statutory eligibility criteria, employees laid off or on short-term working will have a right to a Statutory Guarantee Payment, the amount is currently subject to a maximum of £29 a day (subject to an overall maximum of five days in any three months, giving a maximum of £145). While there is no limit to the period of time on which employees can be laid off or put on short-time working, eligible employees may have the right to claim a statutory redundancy payment if the period of lay-off or short-time working (or a combination of the two) has lasted four or more consecutive

weeks or six weeks (of which no more than three are consecutive) in a 13-week period.

- **Compulsory redundancies.** For employers who are facing severe declines in business due to the impacts of COVID-19, redundancies may be inevitable. Redundancies allow for immediate reduction of short-term staff costs but will require careful redundancy planning and consultation, in order to address the risk of unfair dismissal claims. Large-scale redundancies, of 20 or more proposed dismissals during a period of 90 days or less, require employers to consult with employees collectively, via employee representatives, as well as individually. Employers are also required to conduct a full and fair procedure when making redundancies, which covers the selection of employees for redundancy, considering any alternatives to redundancy (which might include the furloughing of employees pursuant to the scheme (described above)) and actually effecting the redundancies.

- **Voluntary redundancies.** Employers might also consider a voluntary redundancy program for employees, whereby employees can voluntarily agree to a termination in exchange for a redundancy payment. This approach reduces potential conflict because it allows employees to evaluate their current needs and future plans and be part of the decision. A potential disadvantage is that more valuable employees may volunteer themselves, while underperforming employees choose to remain.

For additional information and guidance, please refer to Cooley's Coronavirus Resources page. Cooley's employment team continues to monitor developments stemming from COVID-19 that affect employers and will issue updates as they are available.

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