

## **Furlough – Business Case Document Guidance**

There needs to be a clear business reason to support the need to furlough workers. This must be in place before anyone is placed on furlough and should be set out in the form of a written business case or rationale.

Furlough is an option for a business when the worker's role would otherwise be redundant, due to having no work as a result of the measures arising from the pandemic, such as closure of business premises or total loss of a particular supply chain.

The business case may emerge from internal planning which decides the size and most efficient use of staffing required to meet revised objectives or financial constraints due to the coronavirus pandemic. It may also be written in response to external factors, including, for example, the loss or reduction in sales or external funding caused by the measures taken by our Government to prevent the continued spread of Covid-19.

The business case may take any format. It should give a clear rationale for why certain posts are able to be furloughed. Having a business case document will assist in evidencing this to staff and, if the worst happens, an Employment Tribunal.

None of the rationale contained in the business case should be discriminatory. That means it should focus solely on meeting the commercial objectives required for the business to survive the industry effects of the pandemic.

### **Furloughing specific job roles**

The business case should also identify the job roles of affected employees from which any eventual redundancies may be made, if the furlough is unsuccessful. The business case should explain the specific circumstances as to why a job role (as opposed to the individual occupying it) is furloughed.

For example:

- The business is completely prohibited from carrying out that activity, as a result of Government measures;
- Activity within a certain area of the business has been reduced to such an extent, all employees within that area may face potential redundancy if furlough was not used against some/all of them.

### **Evidence**

While employment tribunals do not tend to look in detail at an employer's business decisions, if there is an allegation that furlough was applied in a disparate or discriminatory manner then evidence will be required to refute this.

What evidence is required may be obvious in a lot of situations, but less so in others. This will be particularly important where you are looking at furloughing certain employees in a particular area of the business, but not all workers carrying out those roles.

Some examples:

- If a downturn in the ability to work has been caused by the Covid-19 Government measures, then having evidence of that downturn would be helpful;
- In a situation where the business need to furlough workers as part of contingency planning or its coronavirus resilience strategy, a summary of the financial and operational impacts of furloughing on the business would be helpful.

In this situation, ensure that your business case factors in considerations such as

- those who are able to work;
- the numbers you need to safely continue to operate, based on demand, without exposing staff to unnecessary risk or social interaction;
- the numbers you can safely manage through staggered start and finish times, staggered lunch breaks and lone working, in order to operate safely and expediently;
- whether any workers in the affected group have any latent risk factors (e.g. pregnancy, disability, age etc.). These will need to be carefully worded in the business case to prevent allegations of direct or indirect discrimination;
- Whether the business wishes to rotate workers on and off furlough, to reduce the financial impact on the individuals whilst maintaining operational continuity;
- Whether any apprentices or trainees require to be furloughed (if so, speak to your LexLeyton advisor to discuss those intricacies and mitigating risk).

### **Format**

As mentioned earlier, there is no set format for how a business case should look. At the very least, though, it should contain the following:

- A brief introduction explaining the current situation.
- Set out which department(s) may be affected by these circumstances.
- Set out what the structure of the affected department(s) looks like now.
- Explain briefly why the current structure is problematic in light of the circumstances.
- Set out how you think the structure of the department should look, explaining how this would address the issues that arise from the current circumstances. In addition, give some details of the pools of employees affected by this situation.

Contact your LexLeyton employment lawyer for advice and guidance on how to prepare your business case and how to plan for and mitigate any risk arising from the steps you then need to take.