

# UK Employment Flash

Insights into the latest employment news

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One Manhattan West  
New York, NY 10001  
212.735.3000

40 Bank St., Canary Wharf  
London, E14 5DS, UK  
44.20.7519.7000

## ACAS, CBI and TUC's Joint Statement on Redundancies

**With pandemic conditions resulting in increased redundancies, three organisations — the Confederation of British Industry; the Trades Union Congress; and the Advisory, Conciliation and Arbitration Service — have issued a joint statement to U.K. businesses addressing how to handle reductions in the workforce. The statement reminds employers that redundancies should be implemented only as a last resort.**

The joint statement encourages U.K. employers to follow five principles when implementing a redundancy process:

- Do it openly: Employers should abide by their collective redundancy obligations, but regardless of the scale of redundancies, share information with the workforce as soon as possible. The sooner people understand the situation, the better.
- Do it thoroughly: Employers should provide employees with information and guidance, and ensure staff representatives are adequately trained to handle the process.
- Do it genuinely: Employers should consider alternatives from individuals and unions before making decisions, and always provide feedback on any alternatives raised.
- Do it fairly: Employers should conduct the redundancy procedure fairly and without any form of discrimination.
- Do it with dignity: Employers should acknowledge the personal impact of redundancies and consider how to handle the process in accordance with the organisation's values.

Shortly after the joint statement was released, ACAS published a study it had conducted that reported more than a third of employers are likely to make redundancies in the next three months. The guidance in the joint statement is also timely for employers considering their options during a second national lockdown, which will potentially be followed by the implementation of the U.K. government's new Job Support Scheme (JSS). The JSS is less generous to employees than the current furlough scheme — the Coronavirus Job Retention Scheme (CJRS), places greater emphasis on businesses facing financial difficulty to assess the ongoing viability of certain jobs, and includes restrictions on employee redundancies during the period within which employers claim grants under the JSS. The JSS also focuses on businesses that are forced to close due to increased COVID-19 restrictions.

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While the joint statement is not legally binding, an employment tribunal may take into account the principles it recommends, and whether an employer followed the ACAS Code of Practice when making a decision regarding redundancies. Employers considering redundancies can enhance their preparation by, among other things:

- considering the use of furlough arrangements throughout the second lockdown (although there is no obligation to do so);
- considering if there will be sufficient work to reinstate furloughed employees, or alternatively, place employees on the JSS when the furlough period ends;
- assessing whether they can implement short-time working under furlough or the JSS; and
- communicating in a timely manner with unions or employee representative bodies and considering any alternatives to redundancies in conjunction with those groups.

The latest U.K. government guidance on the CJRS indicates that the government is reviewing whether employers should be eligible under the CJRS to claim employees serving contractual or statutory notice periods, and that officials may change the approach for claim periods starting on or after December 1, 2020. Further guidance is due in late November 2020, so employers considering dismissals should be aware that the cost of issuing notice following December 1, 2020, may not be covered under the scheme.

### Employee Monitoring During the COVID-19 Pandemic

**Amid a second national lockdown imposed in the U.K., more employers are considering how they monitor the performance of staff working remotely, including the use of workplace surveillance technology. Using this kind of tracking software raises other employment considerations and potential risks.**

Employee monitoring comes in various forms. In addition to the monitoring of emails and internet use that is now common practice for employers, prolonged remote working conditions are prompting employers to consider, for example, monitoring keystrokes, tracking locations or even using webcams to observe employees. Many typical concerns for employers, such as maintaining workplace culture, costs and productivity, have been heightened by employees working remotely. Employers

are also considering enhanced monitoring to help guard against data security risks that may have increased with remote working. However, employers should consider the risks before implementing stricter monitoring practices.

### Data Protection

Under the General Data Protection Regulation 2018 (GDPR) and Data Protection Act 2018, personal data collected from an employee during any monitoring must be:

1. processed lawfully, fairly and transparently;
2. collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes; and
3. adequate, relevant and limited to what is necessary for those purposes.

Employers must also have a legal basis for processing personal data under the GDPR. Employers may be able to rely on a legitimate reason for collecting and processing personal data as the legal basis to do so, but must balance this need against the rights of the employee, which include privacy. Therefore, monitoring must be proportionate.

Conducting a formal data protection impact assessment (DPIA) before implementing any form of employee monitoring will almost always be necessary. Employers should provide employees with detailed information regarding the monitoring and establish safeguards to ensure the processing of data does not fall outside its scope.

Given how invasive some new employee monitoring techniques can be, serious breaches of the data protection regime could be the subject of enforcement action by the Information Commissioner's Office (ICO).

### Privacy

There is no statutory right to privacy in the workplace, but the mutual duty of trust and confidence, which is implied in every employment contract, will still apply to employee monitoring and the processing of employee personal data. Inappropriate monitoring of employee activity could be a breach of the duty of trust and confidence, thus forming the basis of a grievance or constructive dismissal claim. Additionally, excessively stringent monitoring could also breach the right to privacy under Article 8 of the European Convention of Human Rights.

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### Mental Health

Employers have a duty of care towards employees in relation to both their physical and mental health. The isolation associated with the COVID-19 pandemic has highlighted the importance of mental health, with certain studies indicating that almost one in five adults in the U.K. were likely to experience some form of depression during the pandemic. The effect of the pandemic could be compounded if employees feel they are under greater scrutiny as a result of employee monitoring. In serious cases, the effect on mental health may amount to a breach of the employer's duty of care towards the employee's health and safety, giving rise to the possibility of a claim for personal injury or constructive dismissal.

### Key Takeaways

Employers should carefully consider what they are aiming to achieve through increased monitoring. Reflection on the desired outcome will allow company decision-makers to assess whether the means are proportionate and worth the legal risks, or whether to seek different approaches to accomplish their objective.

If employee monitoring is appropriate, careful limits and boundaries should be put in place and employers should be careful to ensure compliance with the GDPR and other relevant laws. More extreme forms of employee monitoring should only be used in very specific circumstances. For example, location tracking is likely to be viewed by the ICO and the U.K. courts as particularly invasive and may therefore carry significant legal as well as reputational risks.

Communication to employees about additional monitoring measures is also crucial, particularly with employees working remotely. If monitoring is used for security reasons, employers must clearly explain this so that employees understand there is no intention to infringe privacy.

### Brexit Update: Where Does Brexit Leave UK Employers Now?

The ongoing Brexit negotiations may lead to uncertainty regarding the direction of U.K. employment law. Businesses should focus on ensuring business continuity in the event of a no-deal Brexit. We look in particular at the operation of European Works Councils, transfers of employee personal data and immigration.

The EU (Withdrawal) Act 2018 provides that all European Union law (including EU legislation relating to employment and workers' rights) will be transposed into domestic U.K. legislation on the date that the U.K. leaves the EU. Following the end of the

transition period on December 31, 2020, in theory the U.K. will be free to diverge from EU legislation, although this will depend on the extent to which any trade deal with the EU imposes conditions and a "level playing field" on workers' rights. If the U.K. exits the transition period without securing a deal, then any potential divergence may come sooner.

The key concerns for European-wide businesses include:

- **European Works Councils:** During the transition period, European Works Councils that are governed by English law or have U.K. participation have continued to function as they did previously. A future trading relationship between the U.K. and the EU could involve a continuance of the current regime, although this seems increasingly unlikely. If the two bodies do not reach a deal, then any existing European Works Councils governed by English law and with U.K. central management would require reciprocal arrangements with the EU to allow the European Works Council regime to continue to operate in its present form. Recent business surveys have shown that although the majority of European businesses have discussed the potential impact of this requirement with their European Works Councils, they do not have a remedial plan in place in the event of a no-deal Brexit. Business with Works Councils should actively discuss the impact with those Works Councils now, including the removal of (or an agreement to continue to include) U.K. employee representatives and renegotiating Works Council agreements governed by English law.
- **Data Protection:** Most European businesses have put in place remedial plans to facilitate transfers of employee personal data between U.K.- and EU-based subsidiaries in the event that the U.K. and the EU do not recognize each other's data protection regimes as equivalent. If that does happen, significant disruption could result, particularly where payroll and other employee personal data is shared within a group across European jurisdictions. Those businesses that have not yet considered the implications of a no-deal Brexit on their cross-border data transfers should do so now to ensure business continuity following December 31, 2020.
- **Immigration:** With over 2 million EU nationals currently employed in the U.K., employers will need to make sure that EU national employees have applied for either settled or pre-settled status before June 30, 2021. While the application process is free and relatively easy to complete, if employees do not apply in time, then they will not have the correct immigration status to continue to work in the U.K. Businesses that currently employ U.K. nationals in other EU jurisdictions should also seek local advice to ensure that U.K. employees have the correct permissions to continue to work in the EU in the event of a no-deal Brexit.

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### ICO Guidance on Subject Access Requests: Clarification for Employers

The U.K. Information Commissioner's Office has published guidance for organisations that receive data subject access requests. It addresses how to respond to a request, including how to "stop the clock" while seeking clarification, as well as how to determine when a request is manifestly excessive or unfounded, which may assist employers when responding to a request made in the context of an employment dispute.

One of the key rights of a data subject under the General Data Protection Regulation 2018 and Data Protection Act 2018 (DPA) allows a person (data subject) to make a subject access request (or SAR) to a data processor, pursuant to which the data processor must inform the data subject of the data it processes about that person and provide copies of that data along with certain information about why and how the data is processed. Strict time limits require the data processor to respond to an SAR within one month from the date of the request, unless the request is particularly complex, in which case the data processor can seek an extension of an additional two months.

The SAR regime is intended to enable individuals to understand how and why the data processor is using their data and to check that the data processor is doing so lawfully. Where a data processor processes a lot of data about an individual — for example an employer's accumulation of data about an employee — responding to an SAR be an onerous obligation.

In December 2019, the U.K. Information Commissioner's Office initiated a consultation on the SAR regime during which many data processors, including employers, raised concerns about their experience of SARs and the evolution of onerous requests in the context of disputes. While many SARs are genuine, claimants can use an SAR to obtain early disclosure of documents related to a dispute, or as a negotiating tactic with the hope that the prospect of incurring costs and management time in responding to an onerous SAR will encourage employers to resolve a dispute with a settlement.

While refusing to respond to an SAR is possible in limited circumstances, including where the request is "manifestly excessive or unfounded," the threshold for this exception is high and, given the law's tight time constraints, rarely relied upon.

In response to the consultation, the ICO has updated its [guidance](#) to include helpful examples and clarification that will make responding appropriately to an SAR easier for employers and other data processors. The guidance includes the following clarifications:

- **Ability to stop the clock.** Many SARs request "all the information you hold about me," with no further detail. The strict time limit in place under the DPA meant that data processors who sought further clarification about the scope of the SAR would lose time to respond. The ICO has now confirmed that if the data processor:
  - i. genuinely needs further clarification to respond to a request; and
  - ii. processes a large amount of data about the individual,

the time limit for responding to the SAR can be paused until the data processor receives clarification. This may assist employers who, for example, keep a lot of information about an employee not only in personnel and performance records but also in emails and other correspondence between multiple parties. They can narrow the request before the clock starts running on their window to fulfill the request.

- **Clarification regarding "reasonable" searches.** The ICO's guidance gives comfort that a data processor may choose to perform a "reasonable" search if it receives a broad SAR and does not seek clarification. The data processor will, however, need to be able to demonstrate that the search is reasonable and proportionate given the circumstances of the SAR and the processor's ability to access the data.
- **Clarification about emails to and from the data subject.** The ICO has confirmed that data processors do not need to provide a data subject with all emails to which he or she is a party. The SAR covers only those emails in which the content relates to the data subject.
- **Guidance on the scope of a manifestly unfounded or excessive request.** The ICO has confirmed that a data processor does not need to respond to a request that is "manifestly unfounded or excessive" and provides guidance as to what that means.
  - **Manifestly excessive:** Determining if a request meets this criteria starts with assessing whether the request is "clearly or obviously excessive," based on whether the SAR is proportionate when balanced against the burden or cost of

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fulfilling the request. To accomplish this, the data processor should take into account all the circumstances of the request, including the nature of the information sought, the context of the request, whether refusal might cause substantial damage to the individual, available resources and whether the request repeats or overlaps with other requests. A request is not excessive just because it entails a large amount of information or significant cost.

- **Manifestly unfounded:** This ground is most likely to help an employer in the context of a dispute. An SAR may be manifestly unfounded if:
  - i. the requester “clearly has no intention to exercise their right of access” — the ICO provides the example of an individual offering to withdraw a request in return for a benefit; or
  - ii. if the request is made “with malicious intent or used to harass the organization with no real purpose other than to cause disruption.” That is likely to apply where the requester has stated this intent, or targets or makes unsubstantiated allegations against another individual, or where the request is part of a campaign against the organization.

Generally a data processor should not apply a blanket policy to SARs and should consider each request on its own merits. If it does not respond on either defined basis, it will need to provide the data subject with its rationale for finding that the request is manifestly unfounded or excessive.

### HMRC ERS Bulletin 37 (October 2020)

**Guidance released from Her Majesty’s Revenue and Customs ensures that participation in certain tax-advantaged share schemes will not be compromised by the effect of the COVID-19 pandemic, including furlough arrangements and reductions in employees’ working hours.**

On October 27, 2020, HMRC, the U.K. tax authority, published employment-related securities (ERS) bulletin 37. The bulletin follows ERS bulletins 35 and 36 published over the summer, and together the guidance addresses various issues related to the impact of the coronavirus pandemic across tax-advantaged share

schemes. Bulletin 37 covers changes made to ensure that participation in Enterprise Management Incentive (EMI) and Save as you Earn (SAYE) schemes is not compromised by the furlough arrangements and consequent reductions in employees’ working hours arising during the pandemic.

#### EMI

The bulletin confirms that the EMI legislation has been modified by the Finance Act 2020 to ensure that EMI option-holders who no longer meet the working time commitment requirements due to the pandemic can maintain the tax advantages and reliefs that would be available had they continued to work for their employer in the ordinary course of business (as confirmed by HMRC bulletin 36). The changes take effect from March 19, 2020, and are due to end in April 2021 (but can be extended for a further 12 months if the pandemic has not ended by then).

The bulletin also confirms that the EMI scheme will continue to be available for use following the end of the Brexit Transition Period on December 31, 2020. The EMI scheme was approved under state aid rules and will continue to be available under U.K. law.

#### SAYE

HMRC confirmed in bulletin 35 the availability of the SAYE extended payment holiday, allowing more than the existing permitted 12 monthly contributions to be missed without the savings contract being canceled, where the contributions are missed due to a person’s furloughing or unpaid leave during the COVID-19 pandemic. Bulletin 36 provided further examples to clarify the operation of the extension. Bulletin 37 (published prior to the commencement of the U.K.’s second national lockdown in 2020) confirms that the extended payment holiday would apply in the same way for the Job Support Scheme, which had been due to replace the Job Retention Scheme (but which has now been postponed).

#### A New Focus on UK Tax-Advantaged Share Schemes

Our September 28, 2020, client alert, “[A New Focus on UK Tax-Advantaged Share Schemes](#),” highlighted the U.K. government’s increasing interest, following a recent HMRC report and recommendations from published research and industry group surveys, in reviewing U.K. tax-advantaged share plans to widen the plans’ appeal and relevance for the current workforce.

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### Contacts

**Helena J. Derbyshire**

Of Counsel / London  
44.20.7519.7086  
helena.derbyshire@skadden.com

**Louise Batty**

Counsel / London  
44.20.7519.7245  
louise.batty@skadden.com

**Damian R. Babic**

Associate / London  
44.20.7519.7253  
damian.babic@skadden.com

**Akshay Chauhan**

Associate / London  
44.20.7519.7285  
akshay.chauhan@skadden.com

**Eleanor F. Williams**

Associate / London  
44.20.7519.7000  
eleanor.williams@skadden.com