Employment law during the coronavirus crisis

As lockdown gradually relaxes, how do firms decide who is reasonably required to come to the office and what are the risks associated with that? **Alexandra Carn** outlines the legal position.

On 23 March 2020 the pause button was pressed on normality. All businesses have faced unprecedented challenges but for financial services firms the challenges are compounded by the overlay of the requirements of their regulators. The catalogue of regulatory developments since March 2020 is myriad. In April 2020 alone the Financial Conduct Authority issued 30 separate legal updates. This article focuses on those developments that relate to employment law issues.

The key advice for firms is found in the publication 'Senior Managers and Certification Regime (SM&CR) and Coronavirus (Covid-19): our expectations of solo-regulated firms' of April 2020 [1] and the similar joint FCA and Prudential Regulation Authority statement. [2] This provides much needed guidance on what is expected of management and in some cases relaxation of specific regulatory requirements.

Senior management requirements have been changed in the following areas:

- Statements of Responsibilities: The requirement to submit an updated Statement of Responsibilities is relaxed where changes are temporary and related to the pandemic, although firms are expected to keep internal records.
- The '12 week rule': This is the rule that allows an individual to cover for a Senior Manager without regulatory approval for a 12-week period. Arrangements that due to the crisis last longer than 12 weeks then can be extended on notification to the FCA to 36 weeks.
- Furlough leave: Although the FCA sees it as unlikely, there is nothing to prevent Senior Managers from being furloughed. If this is temporary there is no requirement for the Senior Manager to be re-approved when they return to work.
- Prescribed Responsibilities: Where a Senior Manager has been furloughed, their prescribed responsibilities should be re-allocated to another Senior Manager. However, if a temporary replacement has been appointed under the 12-week rule, the prescribed responsibilities can be allocated to the temporary replacement, even if the replacement is not a Senior Manager.

The above are the temporary measures put in place at the start of the crisis. Firms are now looking towards how offices will reopen and resuming some form of normality. The Government message remains very much that working from home should be the norm wherever possible. So, how do firms decide who is reasonably required to come to the office and what are the risks associated with that?

The FCA guidance 'Work-related travel – responsibilities of Senior Managers' [3] places the responsibility for deciding who should attend work squarely with Senior Managers. This states, "*Each Firm's designated Senior Manager or equivalent person is responsible for identifying which of their employees are unable to perform their jobs from home and have to travel to the office or business continuity site*." This is not, however, *carte blanche* for firms. The guidance goes on to say, "*We expect the total number of roles requiring an ongoing physical presence in the office… to be far smaller than the number of workers needed to ensure all of a firm's business activities continue to function on a business as usual basis*." And, "*The UK Government has made it clear that… employers should take every step to facilitate their employees working from home*."

The FCA has also provided guidance as to who is a key worker. [4] Being a key worker and being in a firm's view required to attend work are not synonymous; the term key worker is simply that applied to those who are entitled to send their children to school. However, by analogy it is helpful in assessing the sorts of individuals the FCA considers to be business critical. The guidance states that a key worker is one that fulfils "*a role which is necessary for the firm to continue to provide essential daily financial services to consumers, or to ensure the continued functioning of markets*". The determination of this is the responsibility of the SMF1. To that end, the guidance continues, "*Firms are best placed to decide which staff are essential for the provision of financial services. To help firms identify who they are, firms should first identify the activities, services or operations which, if interrupted, are likely to lead to the disruption of essential services to the real economy or financial stability*." The guidance also supplies a list of roles that may be considered as providing essential services. This includes Senior Management functions and, specifically, Risk Management and Compliance.

The question as to whether employees can be required to attend the office creates an uncomfortable juxtaposition between the legal and the practical. The legal position is (assuming an employment contract that requires office working) that the employee must attend work. The only exceptions to this are if they are medically unfit for work, show symptoms of Covid-19 or live with someone showing such symptoms, have been told to self-isolate or are 'shielding' because they are considered at very high risk of severe illness

from coronavirus. If they do not fall within one of these categories then, if they do not attend work if required, that is a disciplinary matter and may ultimately entitle the employer to dismiss the employee.

However, this does not cover the many nuances of employment law. In every contract of employment there is an implied term of trust and confidence, and this will require an employer to make reasonable enquiries as to the reason for an employee's refusal to attend work. Employees with disabilities may be particularly reluctant to attend work; moreover, they have particular protections under the Equality Act 2010 and employers have a specific duty to make reasonable adjustments for disabled employees (Equality Act 2020, section 20). The Employment Rights Act 1996 also provides a very relevant protection. Under section 44(1)(d) and sections 100(1)(d) employees have the right not to be subjected to a detriment by and the right not to be dismissed "*in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work*".

The obvious reference here is that if the workplace cannot be guaranteed safe, then an employee cannot be disciplined or dismissed for refusing to attend work without potentially breaching the Employment Rights Act 1996. This is particularly pertinent as to bring this type of claim there is no requirement to have two years' continuous service, as is the case for most unfair dismissal claims. Also, the cap on the compensatory award in unfair dismissal claims (currently £88,519) does not apply and compensation is potentially unlimited. Equally pertinent are the practical realities. Would a firm really want someone in work who had been 'forced' to attend? How many employees would in that position become unfit for work due to work-related stress?

The above highlights some of the business risk in these novel times, but what are the personal risks for Senior Managers?

The Financial Services and Markets Act 2000 section 66A(5) provides that Senior Managers have a personal responsibility where there has been a breach of a regulatory requirement. The FCA has six years in which to investigate this. Senior Managers can of course rely on the reasonable steps defence (essentially that they took reasonable steps to prevent the breach occurring). Given that the FCA has the ability to issue fines and even custodial sentences, it is perhaps a relief to Senior Managers that the regulator does not require a single Senior Manager for Covid-19 matters (see the FCA/PRA Joint Statement as *supra*). These sorts of sanctions attach to regulatory breaches only, but for other matters there is still the spectre of effects on fitness and propriety considerations and ultimately regulatory authorisation.

In the coming years there will be much examination of how businesses and individuals behaved in these strange times. No-one will be expected to have behaved perfectly or to have got everything right, but it remains that there will be questions and recriminations. What is important is that firms take measured and considered approaches and that they can evidence how decisions were made, if and when the time comes.

Notes

[1] www.fca.org.uk/news/statements/smcr-coronavirus-our-expectations-solo-regulated-firms.

[2] www.fca.org.uk/news/statements/joint-fca-pra-statement-smcr-coronavirus-covid-19.

[3] www.fca.org.uk/news/statements/work-travel-responsibilities-senior-managers.

[4] www.fca.org.uk/firms/key-workers-financial-services.

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