Collective consultation and COVID-19 FAQs

Do I have to collectively consult with staff if I want to make redundancies?

You only have to collectively consult with appropriate representatives when you are proposing to dismiss 20 or more employees at one establishment in a next 90-day period. The only other requirement is if you have a contractual procedure requiring you to do so regardless of numbers (which is the case for some legacy procedures that are directly incorporated into employees' terms and conditions following a TUPE transfer). This guidance note is about the statutory obligation to collectively consult.

Failure to collectively consult could leave you vulnerable to claims for protective awards. These are aside from any unfair dismissal claims, up to a maximum of 90 days' gross pay for each affected employee, depending on the extent and degree of the failure to consult. Unlike unfair dismissal, claims are not limited to those who only have two years' service. All affected employees can claim, regardless of start date.

A failure to consult could also be relevant in any claims for unfair dismissal given that consultation is a crucial component in the test for fairness of a redundancy dismissal.

Can't I just ignore it if my business is in dire straits?

It is inadvisable to do so. Whilst there is an 'exceptional circumstances' defence to a protective award claim, it is only available if you can show that it wasn't reasonably practicable to collectively consult. As the government's Coronavirus Job Retention Scheme (CJRS) was extended until the end of June (at the time of writing), it is likely that employers will be expected to follow their legal obligations and collectively consult.

Most of my staff are furloughed. Can I collectively consult if they are receiving furlough pay?

There is nothing in the CJRS which says you cannot make furloughed employees redundant. In fact, HMRC guidance states that employers can make redundancies during the scheme. There are some risks, though. There could be a question as to whether the CJRS is a suitable alternative to redundancy. This may affect the fairness of the redundancy dismissal. Therefore, it is essential that you have a clear business rationale for any proposed redundancies, demonstrating why, despite the CJRS, there is a need to make redundancies. The other factor to consider is whether there would be adverse publicity from making redundancies at this time.

When does the requirement to collectively consult kick in?

Consultation should begin in good time, which means whilst your plans are at the formative stage, before any decision has been made. This is important, because the purpose of the consultation is to get alternative views on ways to avoid redundancy. If you've already made the decision that redundancies will be made, you're probably too late. It is usually best to start earlier rather than later. A separate duty to inform and consult may, however, arise much earlier if there is an information and consultation agreement in force. You would need to check the terms of that agreement.

How long do we have to collectively consult for?

This depends on how many redundancies you are proposing to make.

If between 20 and 99 employees are potentially affected, consultation must start at least 30 days prior to the first dismissal taking effect. For 100 or more, the minimum period is 45 days. No dismissals can take effect before the end of those periods. They are often called “consultation periods” but that is a bit of a misnomer. You are not required to consult for that entire period, and you can serve notice before it expires. However, this will only be possible if you have reached agreement or otherwise concluded the consultation before the time limit has run its course. Further, it is possible to serve notice within these time frames provided it does not expire before the 30 or 45-day period. If you pay in lieu of notice, notice takes effect when stated in the notice, which is usually when it is received. Remember though, you will still need to consult with individual employees to avoid unfair dismissal claims.

When does the clock start ticking for the 30/45-day period?

When certain statutory information is served on either a recognised trade union or elected employee representatives. Please note it is necessary to have the representatives in place BEFORE you can start consultation. There is further information on the election of representatives later on in this document.

If I am not sure of numbers at this stage, can I stagger redundancies to avoid having to collectively consult?

If you are proposing to dismiss as redundant 20 or more employees in a period of 90 or less days, then the obligation to collectively consult applies. This is quite straightforward if you are only making one batch of redundancies. However, you cannot get around the law by deciding to break it up into tranches of say 10 employees in each round if their dismissals will take effect in the 90-day period.

I have got lots of different sites and at each site there are fewer than 20 employees. Do I have to collectively consult?

The 20 or more proposed redundancy dismissals have to take place at “one establishment”. An establishment may consist of:

1. A distinct entity;
2. With a certain degree of permanence and stability;
3. Which is assigned to perform one or more tasks;
4. Which has a workforce, technical means and a certain organisational structure to allow it to do so.

However, there is no need for it to have the following:

1. Legal, economic, financial, administrative or technological autonomy;
2. A management which can independently affect collective redundancies;
3. Geographical separation from the other units and facilities of the undertaking.

If you have different stores, warehouses, sites, factories, etc, it may be that you can treat them as separate establishments for these purposes. If you have homeworkers or mobile workers, you will need to consider where they may be assigned. If someone is temporarily working from home as a result of COVID-19, they may not be assigned to a “homeworker” group establishment and may be assigned to the office/factory where they are contracted to work normally.

We have different companies within the Group. Do we have to aggregate the employees across the group?

Group companies are treated as separate employers, so redundancies across the group should not be aggregated.

Who are the representatives we have to consult with?

The obligation is to consult with "appropriate representatives". There are three categories:

1. Reps of a recognised Trade Union. The issue is not whether the affected employees are trade union members, but whether the affected employees fall into a category of employee in respect of whom trade union recognition has been granted. In other words, do they fall into the bargaining unit as defined by the collective agreement? Where there is a recognised union, but it is not recognised in respect of all affected employees, the employer must consult other appropriate representatives in respect of those employees who are outside the bargaining unit.

NB: Only if there is no recognised Union would you consider the further alternatives below:

2. Directly elected representatives – that is, elected by employees affected by a specific redundancy proposal for the purpose of consultation on that proposal.
3. A standing body of elected or appointed representatives not specifically elected for the purpose of redundancy consultation. This might be a works council or some other representative employee body. In this case, you must ensure that they are properly elected, and their remit includes consultation over collective redundancies.

We don't have any unions or representatives. Can I just choose them?

No, the statutory rules require an election. In summary:

1. The employer must make such arrangements as are reasonably practical to ensure that the election is fair.
2. The number of representatives to be elected is to be determined by the employer and should ensure sufficient representatives to represent the interests of all affected employees having regard to the number and classes of those employees.
3. The employer must determine whether different classes of affected employees will have their own representatives (the constituency approach), or whether the representatives will represent affected employees as a whole.
4. The employer should determine before the election the term of office of employee representatives so that it is of sufficient length to enable information to be given and consultation completed.
5. All candidates for election of the employee representatives must be affected employees on the date of the election.
6. No affected employee should be unreasonably excluded from standing for election.
7. All affected employees on the date of the election are entitled to vote for employee representatives.
8. Employees are entitled to vote for as many candidates as there are representatives to be elected to represent them for their particular class of employee.
9. The election should be conducted to ensure that, so far as is reasonably practical, voting is in secret and that the votes given at the election are accurately counted.

A failure to follow the statutory rules can also lead to a claim for a protective award.

In the current climate, there could be practical problems to overcome when electing representatives where employees are on furlough. The best approach here is to write or email everyone and ask

them to vote by an electronic voting system. Support should be given to those who are not IT literate.

What happens if the employees won't elect anyone?

If they don't elect anyone within a reasonable time, you will have to consult with them all individually. You would be expected to take "some" steps in order to try and encourage people to come forward though – you shouldn't just sit on your hands. And you will be expected to have given yourself enough time to allow "reasonable" time for them to come back. If it is the employer's fault that time is tight, this will not look good.

Given that everyone might be working remotely, this could be far more difficult than consulting with a few reps, so it would be advisable to try to get reps if possible!

Under the CJRS, employees cannot work while on furlough. What happens if they are representatives?

The government guidance says that representatives may take part in collective representation whilst on furlough.

What information do we have to give to the reps once they are elected?

The following written information must be provided as a minimum:

- The reasons for the proposed dismissals.
- The numbers and descriptions of employees whom it is proposed to dismiss as redundant.
- The total number of employees of any such description employed by the employer at the establishment in question.
- The proposed method of selecting employees who may be dismissed.
- The proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect.
- The proposed method of calculating the amount of any redundancy payments to be made (over and above the statutory redundancy payment) to employees who may be dismissed.
- "Suitable information" about its use of agency workers.

It is necessary to give this information to the reps after election. The employer should provide sufficient information under each of the distinct heads to enable meaningful consultation to take place.

The date on which this information is provided to the representatives will typically be taken to be the date on which consultation begins for the purposes of calculating the 30/45-day period.

How and what do we consult about?

Consultation is about the proposed redundancies and should be "with a view to reaching agreement" about certain matters. It will include consulting over the written information that has been provided and conscientious consideration of the response to consultation. There is no prescribed number of meetings, but typically it would involve two or three meetings with the representatives about which roles may need to be made redundant, the selection criteria to be used and what kind of redundancy payments will be made.

Do I need to notify the government about the proposed redundancies?

Yes, you must notify the Secretary of State for BEIS that you are entering into collective consultation. This must be done on form HR1 and this form must be given to the reps too.

Failure to do so is a criminal offence and can result in a fine.

What happens if the CJRS expires before I have finished consultation?

The Chancellor has said that there will be no cliff-edge end to the CJRS. We're not sure what this means, but it might involve a reduction in the level of contributions or allowing claims to be made for those working short-time in order to encourage people back to work. This is likely to be tied in with any decisions to relax the lockdown and we expect more news on this shortly. However, in order to affect dismissals as soon as the CJRS is proposed to end in its current format on 30 June, consultation would have to start no later than 18 May if you are proposing more than 100 redundancies.

When does notice end? Can you use CJRS to pay notice?

For the purposes of collective consultation time limits, it is the end of the notice that is relevant, not the serving of the notice. You will need to comply with terms of the contract when giving notice.

Notice will be whichever is the greater of contractual or statutory notice (statutory is one week after one month, and then one week for each complete year of service up to 12 weeks).

As far as we are aware, the CJRS can be used towards paying notice pay. In some circumstances, notice pay may have to be topped up to 100%.

If paying in lieu of notice, the CJRS will not cover that, since it only covers periods where the employee remains employed and furloughed. The effect of PILON is to bring the employment/furlough to an end immediately.

Once collective consultation has finished, that's it isn't it? I can make redundancies immediately?

Not necessarily. Anyone with over two years' service has the right to claim unfair dismissal, and to avoid any adverse findings in that regard you are required to consult with them on an individual basis too. Failing to consult with employees who possess protected characteristics could also pursue a discrimination claim if you fail to properly consult with them. The individual consultation can also be commenced within the 30/45-day protected period assuming your collective consultation has been completed first.