



## COVID-19: VARYING TERMS & CONDITIONS Guidelines and Checklist

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### Introduction

Changing employee terms and conditions is a complex area. A balance must be struck between the employer's business needs and the employment rights of staff.

Due to prevailing circumstances, you may need to make changes to terms and conditions of employment or work practices.

Fundamental employment terms that might change include:

- rates of pay
- working time - for example, longer/shorter hours or different days, staggered shifts
- duties and responsibilities
- work locations.

The guidance below is designed to help employers reach consensus with staff before changing terms of employment.

### Governing legislation

The Terms of Employment (Information) Act 1994 provides that where an employer makes a change to any of the particulars of the statement of the employee's terms and conditions of employment, the employer must notify the employee in writing of the nature and date of the change within one month of the change(s) taking effect.

In practical terms, notification of a change of terms will only suffice where the change does not relate to a core term or condition of employment. This

section cannot therefore be used to force through any changes to fundamental or significant employment terms.

### Contractual terms v work practices

There is a distinction, however, between contractual terms of employment and work practices that are not contractual in nature. While a work practice (e.g. modernisation of workspaces) may be changed by an employer unilaterally, a contractual term (e.g. pay, pension scheme, hours of work) may not be altered without an employee's agreement, as this could amount to a breach of contract.

The change that most employers are looking to effect is a reduction in employee wages. This is not surprising given that this is the most significant employee cost for business. Salary would, however, constitute a term of employment rather than a work practice and as such, it cannot be varied unilaterally.

While some contracts of employment contain a clause which expressly reserves the employer's right to make amendments to an employee's contractual terms and conditions of employment, a variation clause must be exercised reasonably at all times.

**Contractual terms** include pay, hours of work, sick pay and pension scheme. Not all of your contractual terms may be in the written statement of your terms and conditions of employment. Some

may be in your staff handbook, a pension scheme booklet or a collective agreement.

**Work practices** can include breaks and rostering, for example. Your staff handbook / policies and procedures may give you details of such practices. It is considered reasonable for an employer to update work practices or processes to save money or increase efficiency

### **Options for changing contractual terms**

An employer cannot unilaterally 'force' through changes in the terms and conditions of an employee's contract. The only 'safe' way to change a contract is by agreeing the change with the other party to the agreement.

It may also be possible for an employer to vary an employee's contract by including an express right to vary the employee's contract of employment, however, the ability of an employer to rely on general variation clauses to unilaterally change a term or condition of employment is limited.

The reasonableness of the employer's actions will be relevant as well as the context for the change.

There will be greater scope to unilaterally impose changes to a term or condition of employment where the particular clause in the contract contains a specific variation clause, e.g. permitting an employer to change the place of work. However, even where a variation clause exists, changes cannot be "forced" through unreasonably, and

generally will require employee consent for major changes.

### **Get your communications right**

Good, timely communication is often the single most important factor in being able to implement changes successfully. Planning carefully usually pays off.

Explain clearly the reasons for the proposed changes - is it to bring terms into line with the rest of the market, to ensure the business remains viable and able to pay competitive salaries and bonuses, to meet good corporate governance standards or as in the current situation, for some other reason?

Be clear about who is affected. Often changes are more palatable if they affect everyone, including management.

Be receptive to feedback where possible and, importantly, be seen to be receptive.

### **Consulting employees**

If you need to change a contract, the first step is to talk with employees (or employee representatives like a trade union).

Before consulting employees, it's a good idea for employers to think about: why they need to make a change and what they need to achieve by making a change? Consultation should be a two-way process where ideas are shared and worked on together.

The employer should:

- explain the reason behind making the change

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- invite employees to talk about their concerns and suggest ideas for alternatives
- listen to employees' concerns and consider their ideas.

### Risks

**Breach of contract:** An employee could take a case to the civil courts for breach of contract and as part of such a claim, could seek injunctive relief to prevent the unilateral variation by his employer. This is a more costly option as there is a risk that an employee would bear the legal costs of the company should the claim be unsuccessful.

### Claims for constructive dismissal under the Unfair Dismissals Acts 1977 – 2015:

An employee could resign and claim constructive dismissal on the basis of a fundamental change to their working conditions or that the Company acted unreasonably by amending the contract without consent. There is a high onus on an employee in such cases to show that the change made their working conditions intolerable and they must have first dealt with any grievance through the company's internal procedures. The maximum compensation that can be awarded is 2 years' gross remuneration; however the award would be based on financial loss and is subject to the employee's duty to mitigate this loss by finding alternative employment.

### Industrial Relations Acts 1946-2004:

This legislation sets out an established procedure to deal with trade disputes in the workplace. The majority of claims under the Acts relate to unionised employees, however the right of access is not limited to unionised workplaces. A trade dispute is defined extremely widely and can cover situations where employees are not happy with the procedures followed by a company in varying their conditions of employment benefits.

### Payment of Wages Act 1991:

Where the change is to their pay, or the change to hours affects their pay negatively, a disgruntled employee could also take a claim to the WRC under the Payment of Wages Act, 1991, claiming that there has been an unlawful deduction made to their remuneration.

<b>Checklist - Varying Terms &amp; Conditions</b>	<b>Yes/No Action taken</b>
What is changing – is it a contractual term or a work practice?	
<p>Even if term that is changing is not set down in them employment contract – how long has it been in existence?</p> <p>Employers must consider if a work practice may be deemed to be an implied term through custom and practice</p>	
Review all contractual and policy documents for references for the term/benefit to be changed – note the documents and clauses that will need to be amended	
Review any collective agreements to ensure the proposed change is not connected with a term agreed collectively – union consultation may be required	
Check if there are any industry specific agreements (registered employment agreements) that apply – these agreements may set specific rates and terms and conditions that cannot be changed without agreement of all the parties to the document	
<p>Is there a right to vary terms and conditions in the contract?</p> <p>It is still highly recommended that employer seeks employee consent especially if it is a significant term that is changing e.g. pay, location, hours</p>	
Ensure proposed change is still in compliance with employment legislation e.g. working time, minimum wage	
If the change is a reduction in hours be mindful that short-time and lay off can give rise to a redundancy situation	
Contact Peninsula to draft proposed changed wording for contracts and policy documents	
Be clear on the reason for the change internally and agree employee communication plan with managers	
Arrange consultation meeting with employees to advise them of the proposed change	
Any individual issues an employee may have with the proposed change should be discussed with the employee with a view to reaching agreement	
<p>Keep notes on file of meetings with each employee including:</p> <ul style="list-style-type: none"> <li>- any issues raised by the employee</li> <li>- any proposals by the employer to overcome these issues</li> </ul> <p>The key is to ensure the employer’s conduct is reasonable and document the employer’s conduct in the event that the employer needs to prove that they acted reasonably in trying to implement the change</p>	

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