

Covid-19:

Caring for your workforce and making fair decisions in a time of rapid change.

The materials in this guidance are provided as a best practice guide and for general information purposes and do not constitute legal or other professional advice.

Please ensure that legal advice is obtained as necessary in relation to any matters contained in this document or in respect of the fair treatment of employees.

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Introduction

There are no rule books for leading an organisation in times like these. A global pandemic, economic and social shutdown and ongoing uncertainty have taken a huge toll on many industries. But many cultural organisations have a special level of difficulty to overcome. It is highly unlikely that we will return to business as usual. We all still have hard times ahead, and difficult decisions to make.

As leaders – of organisations and of people – this can feel like a lonely and stressful time but there is an extra responsibility which falls on us. We have to fulfil our duty of care to the people we employ. It may not be possible to protect them from unwelcome change and restructuring, but they deserve our honesty, and they will be looking to us for clarity and care for their wellbeing during a time of change. Now more than ever, we should be mindful that COVID-19 affects some demographics, including Black, Asian and Minority Ethnic and disabled workers, more than others. We also know from work by Oxford Economics and others that lockdown has been particularly disruptive to young people, those early in their careers and those on low pay.

When forced to make difficult decisions, around restructuring, they should be made soundly, in-line with the laws which enshrine fairness and equality in the workplace. We all know, the Arts Council included, that we still have a way to go on diversity and inclusion. COVID-19 is a huge threat to the work

we are doing to increase representation and change who has influence within our sector.

So how do we approach this situation fairly, legally and transparently? How do we keep up the work we have all done to make sure our workforces reflect the nation? Our ten year strategy, *Let's Create*, identifies many of the workforce, talent and inclusivity challenges ahead and provides a framework in which we can work towards positive change. But before we get to that, we need to manage the short term.

Arts Council England has been providing advice and financial support from the first day of the lockdown. In this document, we are sharing guidance around the duty of care we have to our teams, especially those with protected characteristics. I hope this helps you and them at this stressful time for us all. Whatever comes next, I am confident that we will act with the most essential qualities we all need to show right now: fairness, a commitment to equity and above all, kindness.

Dr Darren Henley OBE

Chief Executive, Arts Council England

Making fair decisions

Whilst the COVID-19 pandemic is an exceptional situation, employers must continue to abide by all employment law legislation including, but not limited to, the Equality Act 2010 (**the Act**) and the public sector equality duty (**PSED**).

This means that you are under a legal obligation to ensure the decisions you make in response to COVID-19 do not directly or indirectly discriminate against employees with “protected characteristics” (see below).

In addition, public sector employers subject to the PSED must, in the exercise of their functions, have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people who share a protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not.

The Equality and Human Rights Commission (**EHRC**) has issued [Coronavirus \(COVID-19\) Guidance for employers](#) which provides examples of how discrimination could take place during the pandemic and refers employers to their guidance on [‘What equality law means for you as an employer: dismissal, redundancy, retirement and after a worker has left’](#).

Please take time to read and review these resources in detail.

If you are faced with a situation in which you need to make difficult decisions as a result of COVID-19, it is important that you consider your actions and as necessary, seek support from independent legal advisors, or your in-house Human Resources Department if you have one.

What is a protected characteristic?

The protected characteristics under the Equality Act 2010 are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation

Decision-making should not be based, directly or indirectly, on an employee’s protected characteristic

There are various types of discrimination and other unlawful conduct set out in the Act that apply to most (and in some cases all) of the protected characteristics:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation
- Instructing, causing, inducing and helping discrimination

Please also note that part-time and fixed-term employees should be treated the same as comparable full-time or permanent employees and enjoy no less favourable terms and conditions (on a pro-rata basis where appropriate), unless different treatment is justified.

It is vitally important that decision-making and the treatment of people does not result in less favourable treatment of employees due to a protected characteristic.

- **Do not make decisions based on protected characteristics**, such as which employees are given extra hours, chosen to work from home or made redundant.

For example, an employer deciding it will no longer recruit candidates from any ethnic minority to front-line roles after finding out some ethnic minorities are disproportionately impacted by COVID-19.

- **Disabled employees must not be treated unfavourably because of something connected to their disability, where the employer cannot show that it is objectively justified.** This applies if you know, or could reasonably have been expected to know, that the person is a disabled person.

For example, an employer rejecting a late appeal against redundancy because an employee's learning disability meant they needed extra help – the employee has been treated unfavourably because of something arising from their disability (rather than because of the disability itself)

GET FURTHER GUIDANCE

Changing roles, working flexibly and restructuring

Arts and cultural organisations are working quickly to reimagine their work, and the processes used to deliver it. This has required staff to take on new or expanded responsibilities and be very flexible in how and where they are working.

This is inevitable in the current circumstances, but it does create a risk of employees, especially those in protected categories, being negatively impacted.

Although many employees will be willing to be flexible, accommodate change and/or adjust their role to assist during the COVID-19 pandemic – changing an employee's role may result in a permanent change to their contractual terms and conditions. Again, it is important to be aware of the legal repercussions of change and to ensure that change is not implemented in a manner which is unlawful or discriminatory. Although some changes may be agreed on an informal basis, it is likely that permanent change will require the need for a formal process. Please take advice on this, as required, both in terms of the process and adequately recording the change.

Restructuring may also result in a need for redundancies. If this is the case, it will be necessary to formulate a clear plan as to how the restructure will be implemented in a legally compliant and fair manner.

If an employee's role is at risk of redundancy, it will be necessary to ensure there is a fair business reason as to why, and that a fair consultation process is followed prior to making any final decisions. This may include pooling employees, and applying fair, objective and non-discriminatory selection criteria. There will also need to be a thorough and meaningful consultation process – on a collective and/or individual basis (depending on the number of employees affected by the proposals).

Prior to commencing any redundancy process it is important to liaise with your legal and HR teams, if you have them, or seek independent legal advice. It is also necessary to consider whether there are any ways and means of avoiding redundancies such as: seeking applicants for voluntary redundancy or early retirement (subject to complying with age discrimination laws), encouraging existing staff to work flexibly on reduced hours by agreement, freezing or restricting recruitment, reducing or banning overtime, reallocation of existing employees to any parts of the business which are less affected by the virus.

Take into account the needs of individual employees:

Taking into account the individual needs of employees can help reduce the risk of less favourable treatment and dissatisfaction among employees. For example:

- Setting up work stations, shifts and home working according to individual employee needs.
- Updating risk assessments to consider the disproportionate impact of COVID-19 on specific groups, such as ethnic minorities, pregnant and older workers, and how to mitigate these risks.
- Implement or expand flexible working options to meet the needs of employees. This could include those with parenting or caring responsibilities who may have lost their childcare arrangements. It could also include disabled people and those with long-term illnesses, including mental health conditions. **Do not make assumptions that remote working automatically benefits everyone.**

If an employer were to equally apply a new policy or practice to everyone, they may place someone with a particular characteristic at a disadvantage. **This would be indirect discrimination**, unless it is objectively justified, or you have a real need to apply the policy and do so in a way that is necessary and appropriate.

An example of this is:

- requiring all employees to continue to work in front-line, key worker roles – this would have a greater impact on those who need to self-isolate or follow the social distancing guidance more strictly, such as disabled, older or pregnant employees or ethnic minority staff due to the disproportionate impact of COVID-19

GET FURTHER GUIDANCE

Wellbeing and mental health

Sudden changes to routine, increased workload, stress and uncertainty can all have a negative impact of the mental health of your employees and on you. Working from home, as many now do and will continue to do for some time, can be source of extra stress – it is harder to regulate hours, domestic distractions and lack of social contact with colleagues are all common causes. Each organisation will find different ways of offering assistance to staff, and could consider extending their support to freelancers with whom they have a close working relationship. We will be releasing further guidance and support on workplace wellbeing in the coming months, covering subjects like stress management and mindfulness.

CASE STUDY – Take a Part acted quickly to put measures in place to help their team.

“We’ve noticed that mental health and self-care for our team is paramount, and we are investing in it. We introduced No Work Wednesdays (same pay, one less day), a Taking Care Fund (£100 for each team member to spend on what makes them feel better) and are working towards an After This is Over Bonus for all the hard work the team has put in.”

[GET FURTHER GUIDANCE](#)

Restructuring: record your decisions and track their impact

Keeping good records and minutes during restructuring will help ensure you're not discriminating against any specific group and may help prove that your decisions are objectively justified.

Useful questions for leaders to ask themselves include:

- who has been placed on furlough?
- who has been made redundant?
- who has been asked to return to the workplace?
- who has gone on unpaid leave?
- how many reasonable adjustment requests have been approved?
- who has been offered flexible working patterns?

If an employee agrees to change any part of their role (such as hours, pay, duties etc.) it will be necessary to update their written employment contract.

Why this is important?

There are lots of reasons why following inclusive practices makes good business sense, including:

- it attracts highly skilled talent and increases staff commitment and retention.
- it builds organisational resilience and reputation as the future of work looks likely to change.
- it removes barriers to employment often faced by those with protected characteristics and reduces absence and related costs.
- employers with existing equality action plans have been able to respond quickly and positively to new challenges.

In addition, if employers make decisions that discriminate against their employees, they may be at risk of:

- having a claim brought against them at an employment tribunal
- costly compensation fees
- reputational damage

Example Equality Impact Assessment Questions

Asking yourself some of the questions below as part of the change process can help to understand and mitigate the impact on equality.

1. Considering all aspects of the proposed activity or change, state what issues and impacts on equality may emerge.
2. What data do we have internally that links to this activity/ process/policy, and what does it tell us about equality impact?
3. Where appropriate, what consultation has been conducted in relation to this proposed change, and what evidence has this provided about equality impact?
4. What relevant external research (data, reports, expert opinion, legislation etc.) has been considered and what evidence has this provided about equality impact?

Communication and culture

This crisis is a moment to reflect on organisational culture and ask how safe a space work feels for all employees. We have all found the need for more, effective consultation and transparent, frequent communication with our teams during this pandemic. Communication can help ease the inherent stress and difficulty of restructuring. Giving regular updates and offering opportunities for feedback is essential at a time when staff are dispersed and likely to feel disconnected from the usual modes of staff engagement.

Communicate upwards: keeping your Board updated with every step of a process is helpful to them and allows you to get feedback on any areas of concern – the Chair may wish to handle this themselves. Either way, every Board member needs to be engaged.

- Pay attention to specific communication needs, such as those on maternity leave, disabled employees or ethnic minority staff who may want to raise concerns about the disproportionate impact of COVID-19.
- Employees should be meaningfully involved in decision-making processes in a way that considers their protected characteristics. They may feel their position could be threatened from raising legitimate concerns. Leaders may need to acknowledge this visibly and new mechanisms may need to be introduced to make speaking up as easy as possible
- Signposting employees to third party guidance and advice on their rights in the restructuring and redundancy process can help provide clarity
- Have conversations about updated risk assessments, current caring responsibilities and arrangements, wellbeing, mental health and employees' ability to carry out their job.

Resources and guidance

Making fair decisions

- Equality and Human Rights Commission – Coronavirus (COVID-19) guidance for employers – [More Info](#)
- Health & Safety Executive – Working safely during the Coronavirus (Covid 19) outbreak – [More Info](#)

Restructuring and changing roles

- Equality and Human Rights Commission – Dismissal, redundancy and retirement – [More Info](#)
- European Human Rights Commission: Guidance for workers about their rights under the Equality Act 2010

The Commission has written a series of guides to explain your rights under equality law. These guides support the Equality Act 2010. The Act brings together lots of different equality laws, many of which we have had for a long time. By doing this, the Act makes equality law simpler and easier to understand – [More Info](#)

- ACAS – Manage staff redundancies – [More Info](#)
- Gov.uk – Making staff redundant – [More Info](#)

Wellbeing and mental health

Arts Council England have an expansive library of resources for leaders covering all aspects of leadership: Art of leadership – [More Info](#)

How to Support Mental Health at Work – The Mental Health Foundation – [More Info](#)

MIND Taking Care of Your Staff – [More Info](#)

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