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Arts, Business and Heritage and the Job Retention Scheme

Overview

Many arts, business and heritage organisations have been drastically impacted by the COVID 19 pandemic with arts and heritage organisations across the country now in the main temporarily closed and many business (outside those providing essential services) either currently closed, running at reduced capacity or providing their services remotely and or from home.

In this article we explore the Job Retention Scheme (the Scheme), where we are now and some of the challenging issues / questions to which there isn't currently a clear answer.

When the Scheme was announced on 20 March 2020, its stated purpose was to allow employers to retain those who "would otherwise have been 'laid off'". However, while there remain references to redundancy in some of the guidance, it appears that there has been a shift in emphasis simply to support those employers who have been "severely affected" by coronavirus.

The Scheme is intended cover businesses, charities, recruitment agencies, public authorities etc. Even public sector organisations are included – although the Government doesn't expect many of them will utilise the Scheme. This is because many of their operations are deemed essential and/or they receive public funding for staff costs.

The Scheme will reimburse eligible employers 80 % of the employee's normal wage / £2500 per month (whichever is lower). Details of eligible employers and eligible employees are set out in detail in the Government's Guidance for Employers and the Direction given by the Treasury to HMRC (links to both are below).

The Scheme has been extended until the end of June 2020.

The Direction from the Treasury to HMRC:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879484/200414_CJRS_DIRECTION_-_33_FINAL_Signed.pdf

The Government's Guidance for Employers:

https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme

Where are we now ?

A number of issues have been clarified in various updates in recent weeks:

Employees on furlough leave cannot perform any work for their employer. This has been extended to include linked or associated organisations, in an apparent bid to limit the scope for abuse of the Scheme.

Those who are statutory Directors can perform certain limited duties. Note however, that these are the duties that are associated with their legal obligations as a statutory Director. Directors and employers should take care that they do not overstep the mark.

The Direction says that employees must be "instructed" not to perform any work for the employer. Therefore those employers who only tell employees that they are "not required" to perform any work might not be meeting the requirements. If employees continue to "perform services" for the employer (which is a fairly wide term) they will not be eligible for a furlough payment.

Employees can be rotated/swapped on furlough. The minimum period of furlough is three weeks. However, there is no minimum "on" period. Therefore an employee could be three weeks on furlough, one day working, and then three weeks on furlough again. Employers may wish to ensure that any written agreement allows them to rotate employees without having to secure a new agreement each time.

How do employers get agreement - Furlough leave must be by written agreement (which can take electronic form such as email). The Scheme makes it clear that ordinary rules of employment law apply. You cannot "put" an employee on furlough leave, especially if you are going to reduce their wages. The Government suggests that employers take legal advice, noting that certain "collective consultation" obligations might apply – which involves having a body of staff representatives elected or consulting with a recognised trade union.

While the Government suggests that collective consultation might apply "if sufficient numbers of staff are involved" that isn't the end of the story. Where there is a recognised trade union involved, bypassing the union and going straight to the employees with an offer of furlough could expose the employer to punitive Tribunal awards of up to £4,917 per trade union member.

The agreement must be in writing. Initial Government guidance required that an employer "notify" an employee that they were to be furloughed. However the new Direction requires that there be an agreement in writing. Those employers who have only notified the employee of their furlough status and then assumed the employee agrees if they don't object (known

as “tacit acceptance”) run the risk that they won’t be eligible. It’s not necessarily too late to resolve any issues that there are with furlough agreements.

Where there are recognised trade unions (see above), their employer should seek to reach agreement with the Union as this is a contractual variation and normal contractual rules apply.

It appears that discretionary payments should be excluded when calculating “normal regular wage”. The Guidance and the Direction include various examples, such as certain bonuses or tips etc. The Direction says that the employer must exclude anything which is “conditional upon any matter”, but that term is so broad that, in our view, certain reasonable parameters to it must be implicit. The purpose of that aspect of the Direction appears to be an attempt to establish what an employee would, but for furlough, have been contractually guaranteed to receive (although certain contractual bonus payments may be included in calculating the average of previous pay).

Although the Scheme initially applied to employees “on the payroll” on 28 February 2020, this has been extended to those “on the payroll” on 19 March 2020. However, a new requirement has been included which affects the number of people who are deemed to have been “on the payroll” – that the employer must have submitted “Real Time Information” submissions to HMRC by the relevant date.

Employees who were “on the payroll” on 28 February 2020 and then made redundant due to coronavirus can be reinstated and then put on furlough leave.

Employers are still be able to implement the usual alternatives to redundancy – such as reduced hours or reduced pay – for those employees who they do not place on furlough leave.

Employers can still make redundancies either during or after furlough. In our view, redundancy consultation can still be conducted during furlough leave. Also, there appears to be no reason why an employee cannot be deemed to be “working” their notice while on furlough leave, thereby reducing redundancy costs.

The HMRC portal for seeking reimbursement is now open:

https://www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme

What we don’t know

Annual leave

HMRC has now updated the Employee’s Guidance (but not the Employer’s Guidance).

https://www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme

The Employee's Guidance now says:

> *"Whilst furloughed you will continue to accrue leave as per your employment contract. You can agree with your employer to vary holiday pay entitlement as part of the furlough agreement, however almost all workers are entitled to 5.6 weeks of statutory paid annual leave each year which they cannot go below.*
>
> *You can take holiday whilst on furlough. Working Time Regulations (WTR) require holiday pay to be paid at your normal rate of pay or, where your rate of pay varies, calculated on the basis of the average pay you received in the previous 52 working weeks. Therefore, if you take holiday while on furlough, your employer should pay you your usual holiday pay in accordance with the WTR. Employers will be obliged to pay the additional amounts over the grant, though will have the flexibility to restrict when leave can be taken if there is a business need. This applies for both the furlough period and the recovery period.*
>
> *If you usually work bank holidays then your employer can agree that this is included in the grant payment. If you usually take the bank holiday as leave then your employer would either have to top up your pay to your usual holiday pay, or give you a day of holiday in lieu."*

Confirmation that annual leave continues to accrue is not new. Nor is the statement that holiday entitlement can be varied under the contract. Similarly, the provision that holiday pay must be paid at normal pay, is not surprising. The statement that employees can take annual leave while on furlough is also consistent with a recent Tweet by HMRC.

What is not yet as explicit as we would like is:

1. Whether taking annual leave breaks or interrupts the furlough period. If it does, that could result in a furlough period of less than 21 days and an application for reimbursement being refused.
2. Whether HMRC will reimburse employers for any part of the annual leave taken by their employees during furlough.
3. Whether employers can require employees to take their annual leave.

The Guidance says that HMRC will keep the holiday pay policy under review.

In our view, the position is likely to be as follows:

1. HMRC are very unlikely to ultimately decide that annual leave breaks furlough, given their tweet and what is currently in the Guidance.

2. We were initially of the view that HMRC was unlikely to reimburse employers, however this new Guidance does suggest that they might well reimburse employers the furlough amount being 80% of the employee's normal regular wage (or £2500 whichever is lower).

3. In our view, employers can include a provision in the furlough agreement requiring the employee to take their annual leave during furlough leave.

Maternity, paternity, parental or adoption leave etc

The Direction suggests that where an employee returns during a period when statutory payments (such as SMP) remain payable, then they would not be eligible for furlough pay if their early return had not been expected. The provisions here are complex and specific legal advice is particularly recommended on this point.

Statutory Sick Pay

It is clear that employers cannot recoup both SSP and furlough pay. However, some aspects of the Direction suggest that if an employee had unexpired SSP due at the time of furlough starting, then the furlough period will not start until the end of that SSP entitlement.

This chimes with an earlier version of the Guidance but, arguably, not the most recent version. Again, specific legal advice is particularly recommended on this complex point.

Miscellaneous

There are various other complexities not entirely resolved either by the current version of the Guidance or the Direction. For example, where employees have changed hours or shifts and using an average would result in an artificially high or low payment.

There are certain provisions in the Direction that relate to employees who have transferred to new employers and to where employers have complexities in their PAYE schemes.

This note is not intended to be a comprehensive account of the Scheme but a general overview of some FAQs based upon the Guidance and Direction as they stand at 20 April.

Insight and updates

We're here to help. For our updates on all business areas visit our Business Hub and for all our employment insight on a wide range of employment issues, visit our Employment page.

For specific questions on furlough leave, contact Barry Nichol.

You may also want to read our Coronavirus insight for employers article here.

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