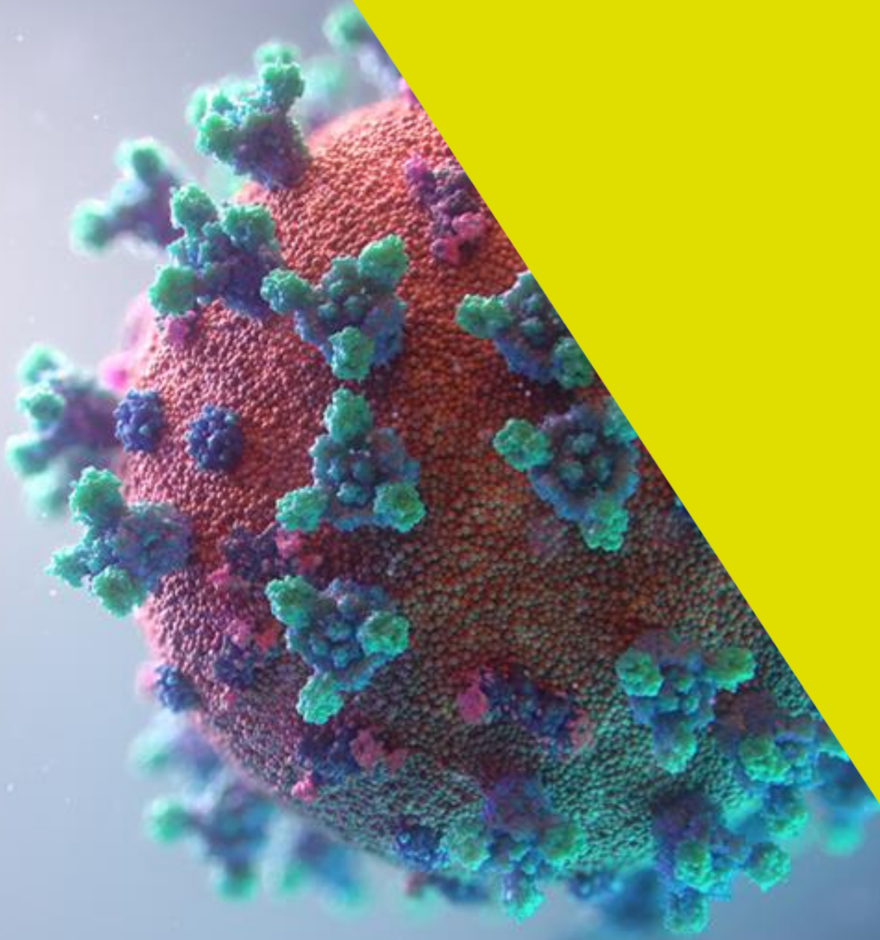
Burness Paull

UPDATED GUIDANCE NOTE:

Coronavirus job retention scheme



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Executive summary

As part of a package of measures to help businesses cope with the effect of Coronavirus, the Government announced on Friday 20 March 2020 that it was introducing a Coronavirus job retention Scheme (the "**Scheme**"). The online HMRC portal for submitting claims opened on 20 April 2020.

Subject to the conditions of the Scheme being met, this means that employers will be able to apply to HMRC for a grant towards the cost of pay for employees who cannot perform their work for reasons relating to COVID-19.

The Government has issued guidance on the operation of the Scheme and the key information is set out in this note. It should be noted that it is guidance only and not legislation. All employers are urged to consider carefully the terms of the Government guidance (which is being updated periodically) to minimise the risk of any claims being rejected by HMRC.

A Treasury Direction ("the **Direction**") has also been issued and contains complex and detailed rules on eligibility and conditions for the Scheme, together with comprehensive information on how claims should be submitted and how HMRC will process them. Employers will need to give careful consideration to how their arrangements comply with these new rules as well as the Government guidance.

This briefing note contains all of the information contained in our updates on the Government guidance to date and since the last version of our briefing note (on Monday 20 April), this note has been updated to include the following information from the government guidance issued on 23 April:-

- details regarding when fixed term employees can be rehired;
- confirmation that employees can be rehired even if their employment terminated after 19 March 2020 (subject to certain eligibility criteria); and
- clarification that collective agreement reached between an employer and a trade union is acceptable for the purposes of the requirement under the Scheme to obtain employee consent to being be furloughed.

What is the purpose of the Scheme?

To alleviate the economic impact on businesses and, crucially, to protect jobs of those who would be at risk of redundancy, the Government has taken the unprecedented decision to step in and provide payroll funding through the Scheme.

The clear intention of the Scheme is to save jobs and protect employees' pay during this crisis. In turn, relieving businesses of a large proportion of their payroll costs will clearly allow a number of businesses to continue trading when they may otherwise not have been able to do so in the current economic situation.

What key points do we know about the Scheme?

Based on the guidance issued:

- **Employers will be able to apply to HMRC for a grant to cover the lower of 80 per cent of an employee's regular wage or £2,500 per month plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions for employees who are not working but are "furloughed" and kept on payroll. The Scheme will only cover employer National Insurance contributions and pension contributions (up to the level of the minimum automatic enrolment employer pension contribution of three per cent) on subsidised furlough pay i.e. so not in respect of contributions above that level.**

- **The Scheme covers any employer with a UK payroll including businesses, charities, recruitment agencies and public authorities (although there is a clear expectation that employers who receive public funding for staff costs won't furlough staff).**

- **The Scheme covers employees who were on an employer's payroll on or before 19 March 2020 and who were notified to HMRC on an RTI submission on or before 19 March 2020 (RTI being the means through which information about deductions under the PAYE system is provided to HMRC by an employer every time an employee is paid). It doesn't cover any employees who started working with their employer after 19 March 2020 or who were not notified to HMRC on an RTI submission on or before 19 March 2020. The employer guidance contains a table to explain these rules which employers should refer to for assistance.**

- **Employees must be furloughed for a minimum of three weeks.**
- **Employees who are furloughed cannot undertake work for, or on behalf of, their employer or any linked or associated organisation i.e. such as a group company. A furloughed employee can take part in volunteer work, if it does not provide services to or generate revenue for, or on behalf of, their employer or a linked or associated organisation. A furloughed employee can undertake training too. Employers can agree to find furloughed employees new work or volunteering opportunities whilst on furlough if this is in line with public health guidance. If your employee has more than one employer, they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.**
- **The Scheme will cover the cost of eligible employee's wages, backdated to 1 March 2020 and for at least four months going forward. The Scheme was initially only for three months but was extended on 17 April 2020 until the end of June 2020.**
- **Employers can choose to "top up" the salary of those employees on furlough, but are not obliged to do so under the terms of the Scheme.**
- **An employee on furlough can be paid less than the national minimum wage without legal risk as long as they do not undertake any training for their employer during furlough.**
- **There will be no limit on the amount of funding available to the Scheme although it is currently only available until 30 June 2020.**
- **It is not a condition of the grant under the Scheme that employers have an overall freeze on redundancies – furloughed (or other employees) can still be made redundant subject to existing employment law.**

Which employees will be covered by the Scheme?

Employers can furlough staff under the Scheme if they cannot maintain their current workforce because their operations have been severely affected by COVID-19. That would, in effect, mean no work is done by the employee during the furlough period due to workplace closure or other impacts on their employer associated with the crisis. It could be viewed as being similar to career break/agreed leave of absence, with the intention being that it is temporary in nature and that once the barriers preventing the employer allowing the employee to work are removed, the employee will return to work and receive pay as normal.

It would seem, when the Scheme guidance and Direction are read as a whole, that the Government is keen to give as many employees cover as possible and so, in our view, as long as employers are genuinely trying to protect their workforce from wage loss and potential redundancy, then they would likely be able to demonstrate that they had to furlough employees and be covered by the scheme. Employers should test their rationale for furloughing against the following statements of purpose from the guidance and Direction:

"It is designed to help employers whose operations have been severely affected by coronavirus (COVID-19) to retain their employees and protect the UK economy. However, all employers are eligible to claim under the Scheme and the government recognises different businesses will face different impacts from coronavirus."

"The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease."

The Direction also provides that an employee is a furloughed employee if the instruction to cease all work is given *"by reason of the circumstances arising as a consequence of the coronavirus or coronavirus disease."*

Employers can furlough part or all of their workforce. The guidance doesn't provide any information on selection process where part of the workforce is to be furloughed but does state equality and discrimination laws will apply in the usual way.

It is also clear that employees must not work for their employers or any linked or associated organisation during the furlough period, so only those who are performing **no work** will be caught. This rules out employees who have agreed to work shorter hours and receive lower pay (i.e. the Scheme cannot be used to top up reduced hours/pay arrangements).

SHIELDING EMPLOYEES

Those who are shielding in line with public health guidance **and** those who need to stay at home with someone who is shielding can be placed on furlough. Our reading of the guidance is that the Government's intention is to provide a furlough mechanism to give these individuals protection from potential dismissal in circumstances where they cannot attend work (because the Government tells them not to) and they cannot do their work from home.

So it would appear that an employer might have two justifications for furloughing shielding employees: the first by reason of their status (so if they can't work from home then they can be furloughed); and the second being the "standard" furlough situation where you are furloughing them like any other employee because of the effect COVID-19 has had on your business.

This should have the result that, if you bring your standard furlough situation to an end for business related reasons, it may still be right to keep a shielding employee on "status" furlough if they are still covered by the relevant Government guidance on shielding.

A shielding employee is now also deemed incapacitated for the purposes of the SSP regulations. In the event that an employer chooses not to furlough a shielding employee, and the employee is unable to work from home, the employee will be entitled to SSP (and potentially company sick pay depending on the scheme rules) unless the employer has other suitable policies in place which the shielding employee can utilise e.g. special paid leave.

CARING RESPONSIBILITIES

The guidance makes it clear that the Scheme covers employees who are unable to work because they have caring responsibilities resulting from COVID-19. The example given is employees who need to look after children (most likely because of school/nursery closures). Our reading of it is that this would be a second example of "status furlough", comparable to the shielding status furlough and so the same analysis would apply as set out above (i.e. the employer may have two reasons to furlough such employees).

APPRENTICES

The guidance is clear that apprentices are covered by the Scheme and can be furloughed just like other employees. The guidance states that:

- **apprentices can continue to be trained during furlough as long as they do not provide services or generate revenue for their employer. However, it's questionable**

in any event how training could be undertaken if an employer's operations are effectively shut down as a result of COVID-19;

- **if apprentices do undertake training, they need to be paid the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage (AMW/NLW/NMW) as appropriate for all the time they spend training. The employer would need to cover any shortfall between the amount claimed under the Scheme and the relevant wage threshold.**

- **The Government have also published specific guidance for apprentices on furlough that should be considered.**

EMPLOYEES ON UNPAID LEAVE

The guidance provides that employees who were placed on unpaid leave after 28 February 2020 can be furloughed. If an employee started unpaid leave on or before 28 February 2020, they cannot be furloughed until the date on which it was agreed they would return from unpaid leave. However, the Direction creates some confusion on this point. One interpretation of the Direction is that no employee can be furloughed if they were placed on unpaid leave which began before or after 19th March. However, that does not sit with the guidance and our interpretation of the Direction is that you cannot claim under the Scheme for an employee on unpaid leave until you have formally put them on furlough.

STATUTORY LEAVE

An employee on maternity leave who is furloughed and qualifies for statutory maternity pay will retain their entitlement to SMP. If an employer offers enhanced maternity pay, the enhanced pay is treated as wages for the purposes of the grant and a claim can be submitted in respect of these costs (subject to the other terms of the Scheme).

In addition to enhanced maternity pay, claims can be made under the Scheme for enhanced adoption, shared parental and paternity pay (where such employees are furloughed).

FIXED TERM AND ZERO HOURS EMPLOYEES

Fixed term and zero hours employees can be furloughed. The extension or renewal of fixed term contracts will not create a barrier to a successful claim under the Scheme. The most recent version of the guidance has clarified that an employee on a fixed term contract that ended can

be re-employed, furloughed and claimed for under the Scheme (provided they would have been furloughed if they had remained in employment) if either:

- **their contract expired after 28 February 2020 and an RTI payment submission for the employee was notified to HMRC on or before 28 February 2020; or**
- **their contract expired after 19 March 2020 and an RTI payment submission for the employee was notified to HMRC on or before 19 March 2020**

See the 'Re-employed individuals' section below for more information on the risks of re-hiring.

RE-EMPLOYED INDIVIDUALS

The guidance stipulates that:-

- **any employees who were employed as of 28 February 2020 and on payroll (i.e. notified to HMRC on an RTI submission on or before 28 February) and were made redundant or stopped working for the employer on or after 28 February; and**
- **any employees who were employed on 19 March 2020 and on payroll (i.e. notified to HMRC on an RTI submission on or before 19 March) and were made redundant or stopped working for the employer on or after 19 March 2020;**
- **can be re-employed by their employer, put on furlough and a claim for their wages can be made through the Scheme from the date they were furloughed, even if there are not re-employed until after 19 March (provided they would have been furloughed if they had remained in employment).**

If an employee has had multiple employers over the past year, has only worked for one of them at any one time, and is being furloughed by their current employer, their former employer/s should not re-employ them, put them on furlough and claim for their wages through the scheme.

Employers are not obliged to re-hire employees and there remains a question over whether continuity of service would be preserved if re-hiring occurs. Care should be taken in terms of the contractual mechanism and statutory employment law effect for such re-hires.

We consider that employers will also need to ensure that any such arrangements are consistent with the purpose of the Scheme and be prepared to demonstrate that such individuals would have been furloughed had they not left.

TUPE TRANSFER

Employers are eligible to claim under the Scheme for employees of a previous business who transferred after 19 March 2020 if either the TUPE or PAYE business succession rules apply to the change in ownership.

Where a group of companies has multiple PAYE schemes and there is a transfer of all employees from these schemes into a new consolidated PAYE scheme after 19 March 2020, the new scheme can furlough those employees and claim under the Scheme.

EMPLOYEES ON SICK LEAVE

The guidance provides that if employers want to furlough employees *for business reasons* and they are currently off sick, they *can* do so - the employee should then no longer receive sick pay and would be classified as a furloughed employee. Employers can claim back from both the Scheme and the SSP rebate scheme for the same employee but not for the same period of time. When an employee is on furlough, employers can only reclaim expenditure through the Scheme, and not the SSP rebate scheme. However, the Direction creates some uncertainty on this point. One interpretation of the Direction is that, when read alongside the guidance, if an employer chooses to move those on sickness absence to furlough, the furlough period can only start from the date when the employer has taken them off sickness absence (and so would preclude backdating). Another interpretation of the Direction is more akin to the earlier versions of the guidance, being that those employees entitled to receive SSP cannot be furloughed until their SSP entitlement has ended. This uncertainty is unhelpful given that it appeared the position had been clear under the updated Government guidance, so it is hoped that the Government will provide clarification.

OTHER CATEGORIES

The guidance clarifies that foreign nationals can be furloughed. Grants under the Scheme are not counted as “access to public funds” for the purpose of any visa conditions, and employers can furlough employees on all categories of visa.

As well as employees, the grant can be claimed for any of the following groups, if they are paid via PAYE:

- **office holders (including company directors)**
- **salaried members of Limited Liability Partnerships (LLPs)**

- **agency workers (including those employed by umbrella companies)**
- **limb (b) workers**

The guidance contains detailed information on each of these categories which should be considered carefully before claims are made. The Direction also contains further information regarding some of these categories.

Which employees will not be covered by the Scheme?

The following employees will not be covered by the Scheme:

- **the Scheme is not intended for use for employees on short-term absences from work due to sickness. Short-term illness or self-isolation should not be a consideration in deciding whether to furlough an employee. If an employee is on sick leave or self-isolating as a result of Coronavirus, they'll be able to get statutory sick pay (SSP), subject to eligibility, unless their employer decides to furlough employees for business reasons;**
- **employees who were on unpaid leave on or before 28 February 2020 (until the date on which it was agreed they would return from unpaid leave);**
- **those employees who are able to do their job from home even if their normal place of work has been shutdown;**
- **those employees who have reduced their hours/pay but are still working (it is clear that employees must not work for their employers or any linked or associated organisation during the furlough period, so only those who are performing no work will be caught);**
- **employees whose employment started and ended during the period 28 February 2020 and 19 March 2020 will not qualify even if they are re-hired; and**
- **those employees who are otherwise able to attend work and whose employers' operations have not been severely affected by COVID-19.**

After heavy lobbying, the Government moved the payroll eligibility date from 28 February 2020 to 19 March 2020. This may assist to catch some so called “new starts” not caught by the previous versions of the guidance but any new start also needs to have been notified to HMRC on an RTI submission on or before 19 March 2020. Therefore, whether or not a new start is

caught will be dependent on the date of an employer's payroll run. This may still leave a large number of workers without coverage.

Employers will need to address the question of what they will do with new starts, who are still not caught by the Scheme. New starts may be eligible to apply for universal credit.

Which employers can claim under the Scheme?

The following section of the guidance sets out the eligibility criterion:

Employers must have:

- **created and started a PAYE payroll Scheme on or before 19 March 2020**
- **enrolled for PAYE online - this can take up to 10 days**
- **a UK bank account**

Any entity with a UK payroll can apply, including businesses, charities, recruitment agencies and public authorities.

Note, however, that the guidance states that it is not expected that many public sector employers will use the Scheme, so any employer which is publicly funded should consider carefully whether they should make claims.

Individuals can furlough workers, such as nannies, if they were paid through PAYE and sent HMRC an RTI submission notifying a payment in respect of the employee on or before 19 March 2020.

Administrators although the Scheme guidance states that:

"…we would expect an administrator would only access the Scheme if there is a reasonable likelihood of rehiring the workers. For instance, this could be as a result of an administration and pursuit of a sale of the business."

When does furlough start?

Claims should be started from the date that the employee finishes work and starts furlough, not when the decision is made, or when they are written to confirming their furloughed status.

It has been confirmed that employees can come on and off furlough multiple times, but that for any claims under the Scheme the minimum furlough period must be three weeks.

What can we claim for and how do we claim under the Scheme?

The Scheme will be operated by HMRC. HMRC have produced a step-by-step guide for employers on how to claim under the Scheme to which employers should refer.

Employers wishing to make a claim will need to calculate the amount they are claiming using the Government guidance available to assist them. The Government published further guidance on 17 April 2020 to help employers calculate 80 per cent of their workers wages to assist with such calculations and which is being updated periodically.

For full time and part time salaried staff the employee's actual salary before tax in their last pay period prior to 19 March 2020 should be used to calculate the amount to be paid. However, the most recent version of the guidance provides that if, based on the previous guidance, an employer has calculated their claim based on the employee's salary as at 28 February 2020 (and this differs from their salary in their last pay period prior to 19 March 2020) an employer can choose to still use this calculation for their first claim;

For employees whose pay varies:

a) if the employee has been employed for a full 12 months employers can claim the higher of (i) the same month's earnings from the previous year or (ii) average monthly earnings from the 2019-20 tax year: or
b) if the employee has been employed for less than 12 months employers can claim for an average of their monthly earnings since they started work.

The Direction has introduced very detailed provisions regarding how the reference pay for both salaried and variable pay staff should be calculated. Careful consideration will need to be given to the Direction in order for an employer to establish which of the categories an employee falls into. The Government calculation guidance referred to above should also be used.

Employers can claim for any regular payments they are obliged to pay their employees. The guidance states that this includes regular wages, piece rate payments and non-discretionary overtime, fees and commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded. The Direction also contains very detailed information on what payments are regarded as regular payments and employers should consider this fully before submitting claims under the Scheme.

Employer pension contributions above the mandatory auto-enrolment contributions (based on the furlough pay) cannot be claimed for.

The following guidance regarding benefits in kind and salary sacrifice is given:

- **The reference salary should not include the cost of non-monetary benefits provided to employees, including benefits in kind (such as a company car). Similarly, benefits provided through salary sacrifice Schemes (including pension contributions) that reduce an employee's taxable pay should also not be included in the reference salary. All the grant received to cover an employee's subsidised furlough pay must be paid to them in the form of money. No part of the grant should be netted off to pay for the provision of benefits or a salary sacrifice scheme. Where the employer provides benefits to furloughed employees, this should be in addition to the wages that must be paid under the terms of the Job Retention Scheme. Notably, the Government has confirmed that COVID-19 counts as a "life event" enabling an employee to switch out of salary sacrifice should they so wish (subject to the relevant contractual change being made).**

Finally, it has been confirmed that both the apprenticeship levy and student loans should continue to be paid as usual and these payments cannot be claimed under the Scheme.

Once employers know how much they are claiming they will have to work out the amount of employer National Insurance contributions and minimum automatic enrolment employer pension contributions they are entitled to claim based on the furlough pay **in addition** to the 80 per cent of wages.

In addition to the amount they are claiming employers will have to provide the following information to HMRC:

- **PAYE reference number;**
- **number of employees being furloughed;**
- **names, national insurance numbers and payroll/employee number of the furloughed employees;**

- **employer’s self assessment unique taxpayer reference or corporation tax unique taxpayer reference or company registration number;**
- **the claim period (start and end date);**
- **amount claimed (per the minimum length of furloughing of 3 consecutive weeks)**
- **bank account number and sort code;**
- **employer contact name; and**
- **phone number.**

The guidance contains details on how the required employee information should be submitted to HMRC (depending on whether there are fewer or more than 100 furloughed employees).

If an employer is eligible for the grant HMRC will pay the amount claimed via a BACS payment. Employers are then required to pay the employee the full grant received.

Employers will need to do calculations themselves before they submit their claims. An employer should retain all records and calculations in respect of their claims, including records of the amount claimed for each furloughed employee and the period for which each employee is furloughed and a claim made under the scheme.

When making the claim, employers are advised to use the information contained in their payroll (either shortly before or during their payroll run).

Claims can be backdated to 1 March 2020 “where employees have already been furloughed”. In other words, the claim can be made from the date that the employee was placed on furlough and the 1 March 2020 is the earliest date from which employers can claim.

HMRC will have the right to retrospectively audit any claims that are made and have stated that they will carry out fraud checks before processing the payments. Payments may be withheld or need to be repaid in full to HMRC if the claim is based on dishonest or inaccurate information or found to be fraudulent. There is an online portal for employees and members of the public to report any suspected cases of fraud.

What rights do furloughed employees have?

Placing an employee on furlough will be a change to their contract of employment. The Government's guidance is clear that employers should make any changes to the employee's contract by agreement and that it may be necessary to carry out collective consultation where more than 20 employees are involved. Our understanding is that there is no change to the current triggers for collective consultation and that this obligation would only be engaged where an employer contemplates 20 or more dismissals by reason of redundancy (including dismissal and re-engagement where consent to changes to terms and conditions are not obtained).

The Government's guidance states that employees who have been furloughed have the same rights as they did previously including SSP entitlement, maternity rights, other parental rights, rights against unfair dismissal and the right to a redundancy payment if they are made redundant.

Furloughed employees who become ill must be paid at least SSP. It is up to employers to decide whether to move these employees onto SSP or to keep them on furlough, at their furloughed rate. It is not clear however if moving an employee onto SSP would break the three week minimum furlough period and therefore put the grant at risk (but this seems likely). Employers with enhanced company sick pay provisions should think carefully about this point and may wish to consider seeking agreement to disapply these during furlough, particularly if they are not topping up furlough pay so that it is equal to or more than any company sick pay entitlement. If a furloughed employee who becomes sick is moved onto SSP, employers can no longer claim for the furloughed salary. The Statutory Payments Manual for SSP has been updated to make it clear that employees on furlough do not qualify for SSP. Employers are required to pay SSP themselves, although may qualify for a rebate for up to two weeks of SSP. If employers keep the sick furloughed employee on the furloughed rate, it seem that they remain eligible to claim for these costs through the Scheme.

The most recent version of the employer guidance confirms that an employee will continue to accrue holiday entitlement during a period of furlough and employees can take holidays whilst on furlough. This means that taking holidays during furlough will not break the furlough period. Employees will need to be paid their normal entitlement to holiday pay during holidays i.e. the employer will need to top up the grant amount. The guidance also provides that employers will have the flexibility to restrict when leave can be taken if there is a business need both during the furlough period and the recovery period. The guidance does not confirm whether employers can direct employees to take holidays during the furlough period in the normal way. There is some uncertainty whether a direction to staff to take holidays during a lockdown period, when their activities are severely restricted, is compliant with the European legislation requiring annual leave to provide true rest and relaxation away from work. As such, employers should seek

advice before deciding whether to direct employees to take holiday during furlough. It should also be noted that the guidance states that ‘during this unprecedented time, we are keeping the policy on holiday pay during furlough under review’.

An employee who has been furloughed by their employer can earn money in a second job. An employee’s furlough status with their employer is not linked to or contingent upon any other employment arrangements they have, albeit their employer may have a contractual restriction in place which would prevent the employee having a second job.

What are the payment timescales for the grants?

The Scheme opened for applications on 20 April with the first payments being made by around the end of April. Employers will therefore have to decide whether to pay furloughed employees 80 per cent of their salary until the grant is received (and claim for reimbursement) or place employees on furlough on an unpaid basis until the grant is received (on the basis that any back-pay received would be passed onto the employees as soon as it is received). It’s important to note that reducing payments due to employees before the Scheme comes into operation or placing employees on a period of unpaid furlough pending receipt of the funding would be a change to the employees’ contract and the usual principles on changes to terms and conditions would apply.

How do we communicate this to employees?

Communicating this change to employees is the area in which the highest legal risks are likely to arise. Changing the status of employees’ remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation.

The usual principles of changes to terms and conditions will apply to placing employees on furlough. We don’t anticipate many employees will push back on this designation of furlough status, given it will be far more attractive than the alternative options.

It is a strict condition of the Scheme that employers write to any employee who is to be furloughed to notify them that that is the case. The Direction appears to add a new condition that employers have to meet to claim under the Scheme being that an employer has to obtain an employees written agreement that they will cease all work. This requirement is inconsistent with the previous versions of the guidance for employers which only required an employer to

confirm in writing the agreement to furlough – there was no reference in the guidance to the employee having to agree in writing. On a strict reading of the Direction, HMRC could reject claims or seek recovery through an audit of sums already paid out where there is no evidence of this agreement in writing from the employee. However, the employer guidance was updated again on 17 April 2020 (after the Direction was published) to provide that *"To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. If this is done in a way that is consistent with employment law, that consent is valid for the purposes of claiming the CJRS. There needs to be a written record, but the employee does not have to provide a written response."* The revised employer guidance appears to have been updated following calls for clarity after the Direction was produced. In light of this further revision to the employer guidance, and given that employers are asked to confirm that their claim is made in accordance with the guidance - not the Direction - when they submit their claim to HMRC, we would hope that HMRC would take the view that there is no need for employees to confirm in writing that they agree to cease all work as long as the employee has agreed to be furloughed in accordance with normal employment law principles. Collective agreement reached between an employer and a trade union is also acceptable for these purposes.

Employers must keep a record of the written communication. If no written notification is issued an employer will not be eligible to receive the grant. These records must be kept for five years.

Reference to the arrangement being subject to existing employment law and terms of the current contract will essentially mean that employers will need to be careful to act in a manner consistent with their existing express and implied obligations to employees when seeking to implement the Scheme. Any union obligations will also need to be borne in mind. However it is worth noting that the Scheme has been endorsed by a number of trade unions and was created in consultation with the TUC.

One key point to note is that the language you use in staff communications will need to be extremely carefully crafted so as to hinge any entitlement afforded to employees upon acceptance of your claim under the Scheme, so that no contractual entitlement is created inadvertently by way of general promises by an employer to keep people employed and pay them a certain amount of their wages for a specific period of time.

What should we do next?

If you are considering placing employees on furlough under the Scheme the next steps will be:

- **identifying which of your employees are to be furloughed;**

- **if required, considering how you will select employees for furlough;**
- **deciding whether to take other steps to reduce your costs pending receipt of the grant;**
- **implementing the relevant changes to a furloughed employee's contract of employment (mindful of the usual legal principles);**
- **issuing written confirmation of furlough to employees who are to be placed on furlough and obtaining employees agreement that they will cease all work;**
- **calculating the amount you are going to claim and the NI and pension costs; and**
- **submitting the information required to claim the grant to HMRC.**

How can we help?

We can help you to put the steps in place to successfully implement furlough and provide you with the documentation you need.

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Across the firm, we have a team of specialists dedicated to provide up the minute advice on COVID-19. For more details, click here.

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