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COVID-19 Key Developments in UK Employment Law: What You Need to Know

April 1, 2020

This update reviews the key recent developments in UK employment law in the midst of the COVID-19 disruption, including the government's updated guidance on the Coronavirus Job Retention Scheme (the Scheme). This alert is up to date as at 1 April 2020.

What is the Coronavirus Job Retention Scheme and how does it operate?

As described in our update of 23 March 2020, under the Scheme, all UK employers regardless of size will be able to apply to HMRC for a grant which will reimburse 80% of the wage cost of employees who are designated as "furloughed workers", up to a cap of £2,500 per month. Employers will be able to choose whether to top-up the wages of furloughed workers to their normal level but will not be required to do so.

The updated government guidance states that the Scheme is open to employers who had created and started a PAYE payroll scheme on or before 28 February 2020 and have a UK bank account. The minimum length of furlough is three weeks. The Scheme also covers employees who were made redundant since 28 February 2020, if their employer rehires them.

Further, the guidance clarifies that the furloughed employees can include employees on agency contracts and on flexible or zero-hour contracts (as well as full-time and part-time employees).

The guidance states the following employees cannot be furloughed: employees who are working but on reduced hours or for reduced pay; any employees hired after 28 February 2020; employees absent on sick leave or self-isolation (although they may be eligible after the relevant period is over); and employees on unpaid leave, unless they were placed on unpaid leave after 28 February 2020.

The guidance confirms that employers will receive a grant to cover the lower of 80% of an employee's regular wage or £2,500 per month and sets out a mechanism to calculate applicable earnings for employees whose pay varies. In addition, employers will be able to claim a grant for the associated employer National Insurance contributions and the minimum automatic enrolment employer pension contributions on the subsidised wage (further guidance relating to the employers' calculations of their claims will be issued ahead of the Scheme going live). Fees, commission and bonuses are not included. The salary paid will remain subject to the usual income tax and other deductions.

It is worth noting that furloughed employees will still retain all their employment rights, such as their right to Statutory Sick Pay and their right to accrue and take paid annual leave. When the government ends the Scheme, each employer will need to decide whether their employees can return to their duties or whether terminations will be required.

What about protection for self-employed individuals?

The Self-Employed Income Support Scheme (the SISS) is intended to provide similar support for the self-employed as that already available for employees as described above. As such, the SISS will allow self-employed individuals or members of partnerships to claim taxable cash grants worth 80% of their trading profits up to a maximum of £2,500 per month for three months.

In order to be eligible, self-employed individuals or members of partnerships must have trading profits in 2018-

19 of less than £50,000 *or* have average trading profits across the three years 2016-17 to 2018-19 of less than £50,000, provided that, in either case, those profits constitute more than half of the individual's total taxable income.

In addition, those intending to claim under the SISS must satisfy the following requirements:

- have submitted an Income Tax Self-Assessment tax return for the tax year 2018-19 (or will do so before 23 April 2020)
- have traded in the tax year 2019-20
- be trading at the point of application, or would be but for COVID-19
- intend to continue to trade in the tax year 2020-21
- have lost trading/partnership trading profits due to COVID-19

HMRC will contact those who are eligible for the SISS, and the Chancellor has announced the SISS may not be fully operational until 1 June 2020.

What changes did the Coronavirus Act 2020 (the Act) introduce?

Emergency volunteering leave

This is a new form of statutory unpaid leave introduced by the Act. Employees will be able to take a maximum of four weeks leave in any 16-week volunteering period. Other employment terms and conditions continue as normal, and the usual protection against detriment and dismissal for taking the leave will apply.

In order to take emergency volunteering leave, an employee must provide three working days' notice and obtain a certificate issued by an appropriate authority. A compensation scheme will be set up to cover any losses employees incur by taking the leave. Certain employees will not be eligible for emergency volunteering leave – for example, where their employer employs 10 or fewer employees or they are civil servants.

Statutory Sick Pay (SSP) changes

In order to qualify for SSP, an employee must be absent from work due to incapacity. The Act allows for SSP to be paid from the first day of incapacity, with retrospective implementation for incapacity for work falling on or after 13 March 2020.

SSP deemed incapacity rules have been extended to cover those who are isolating to prevent infection or contamination with the coronavirus, in accordance with guidance published by PHE, NHS National Services Scotland or Public Health Wales, and by reason of that isolation they are unable to work.

While it was previously indicated that employers with fewer than 250 employees will be able to reclaim SSP paid in respect of the first 14 days of COVID-19 related sickness absence, this is not stated in the Act. As the Secretary of State is given the power to make regulations regarding the recovery of additional payments of SSP by certain employers for absences related to the coronavirus, regulations are awaited in order to confirm the details of the scheme.

Is there an update in relation to tribunal hearings?

The Presidents of the Employment Tribunals in England and Wales and in Scotland have directed that, from Monday 23 March 2020, all in-person hearings (hearings where the parties are expected to be in attendance at a tribunal hearing centre) listed to commence on or before Friday 26 June 2020 will be converted to a case management hearing by telephone or other electronic means which will take place (unless parties are advised otherwise) on the first day allocated for the hearing.

If the case is set down for more than one day, then parties should proceed on the basis that the remainder of the days fixed have been cancelled.

Anything else?

Annual leave carry-over where it is "not reasonably practicable" to take leave

New regulations have been passed which allow up to four weeks of unused statutory leave to be carried into the next two leave years, in this way amending the statutory prohibition on carrying over four weeks of statutory holiday. This allows staff to continue to work on the national effort against COVID-19 without losing their annual leave entitlement. While this is intended to support key industries at this critical time, some employers may still choose to require their employees to take their annual leave entitlement.

NHS 111 isolation notes

On 20 March 2020, the government introduced a new system of isolation notes which employees can use to provide evidence to their employers that they have had to self-isolate due to COVID-19, either because they have symptoms or because they live with someone who has symptoms. This is designed to circumvent the need to visit a doctor and can be obtained from the 111 coronavirus online service (in England).

Enforcement of gender pay gap reporting suspended

The Government Equalities Office and the Equality and Human Rights Commission have taken the decision to suspend enforcement of the gender pay gap deadlines for this reporting year (2019-20). This regime requires organisations with 250 or more employees to publish information regarding the average gender pay gap in their organisation on the final day of a reporting year, but this decision means there will be no expectation on employers to report their data and no enforcement action for failing to report.

This alert is up to date as at 1 April 2020.

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Key Contacts

Ann Bevitt London	abevitt@cooley.com +44 (0) 20 7556 4264
Chris Stack London	cstack@cooley.com +44 (0)20 7556 4389

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