Cooley

UK Employment COVID-19 Webinar – FAQ Update

May 14, 2020

In April, we hosted a webcast focused on the key issues facing UK employers in response to the COVID-19 pandemic. Following on from that webcast, we set out below some of the frequently asked questions that we have recently encountered, together with our responses. This alert is up to date as at 14 May 2020.

Coronavirus Job Retention Scheme

Have there been any recent changes to the scheme I should be aware of?

The UK's Treasury Direction to HMRC relating to the scheme was released on 15 April. There have been several updates to the scheme guidance, and the portal through which businesses make their claims went live on 20 April 2020. In addition to the changes to the duration of the scheme and eligibility being extended to employees on the payroll on or before 19 March 2020 (discussed below), the key points to note are:

1. **Who can be furloughed?** Contrary to the initial indications, the scheme is not limited to employees who would otherwise be made redundant. The Treasury Direction states that the scheme applies to any employees who are furloughed "by reason of circumstances as a result of coronavirus or coronavirus disease". In other words, the indication is that there needs to be a link between coronavirus and the need to furlough employees.
2. **The need for a written agreement:** Despite initial contradiction between the Treasury Direction to HMRC and the revised guidance, HMRC has clarified that employers should follow the guidance; this states that employers are simply required to notify their employees (in writing) that they have been furloughed, and that the employee does not need to provide a written response. A record of the communication must be kept for five years. Nonetheless, it is best practice to have a written and signed agreement with the employees who are now being furloughed.
3. **Step-by-step guidance:** The government has provided further guidance on how to work out what employers can claim, including some worked examples.
4. **Keep all records and calculations:** HMRC have asked employers to retain all records and calculations for their claims, in case HMRC need to contact employers about them. In addition, provided claims are made in accordance with the published guidance, receipt of funds are to be expected six working days after application.
5. **Some statistics:** As at 12 May 2020, more than 7.5 million jobs have been reported as furloughed.

When is the deadline for furloughing staff and how long is the scheme going to remain open?

The government announced on 12 May 2020 that the scheme has been extended until the end of October (following the previous extension to 30 June 2020). Employers can use the scheme anytime during this period (although note that the minimum period of furlough is three weeks). The government indicated in its announcement on 12 May 2020 that new flexibility will be introduced from August to get employees back to work part-time with employers being asked to pay a percentage towards the salaries of their furloughed staff. Further detail is expected to be announced by the end of May.

If employee representatives go on furlough leave, are they able to continue their role of employee representatives, or will new representatives have to be nominated?

The guidance has now been updated to clarify that employees who are union or non-union representatives may undertake duties and activities for the purpose of individual or collective representation of employees or other workers. As such, it is not a breach of furlough for employers to consult with employee representatives (for example in relation to a collective redundancy or TUPE consultation process) or for furloughed employee representatives to accompany colleagues during disciplinary or grievance meetings. However, the guidance clearly states that in fulfilling their roles, employee representatives must not provide services to or generate revenue for, or on behalf of their employer's organisation or a linked or associated organisation.

Can employers claim for reimbursement of pension contributions?

The updated guidance states that employers will be able to claim for pension contributions up to the level of the minimum automatic enrolment employer pension contribution on the capped furlough pay, provided the employer pays the whole amount claimed to a pension scheme for the employee as an employer contribution.

The maximum level of grant for employer pension contributions on subsidised furlough pay is set in line with the minimum automatic enrolment employer contribution of 3% on qualifying earnings.

Can employers continue inviting furloughed employees to "keeping in touch" calls and allow access to instant messaging services purely for social purposes (with no work undertaken)?

An employee must cease all work while they are furloughed so communication should be kept to a minimum and you should avoid any risk that an employee may, in fact, be conducting any work. General update communications (for example to inform the furloughed employee about general developments or actions that the business is taking in response to the crisis) or instant messaging for solely social purposes should not cause a problem.

However, this should be assessed on a case-by-case basis and employers should ensure there is no risk of work being undertaken (for example, any work-related questions being discussed on instant messaging platforms).

Can employers furlough employees who have recently resigned?

The starting point is that employers can only claim for employees that they employed on 19 March 2020 *and* who were on the employer's PAYE payroll on or before 19 March 2020.

This means that a real time information (RTI) submission notifying payment in respect of that employee must have been made by 19 March 2020.

Where redundancies have been made, if these occurred after 28 February, employers can give former employees the option to be re-employed and put on furlough, provided they were on the employer's payroll *and* an RTI submission was made in respect of that employee on or before 28 February. This is the position even if the employees are not re-employed until after 19 March 2020.

Employees that were made redundant on or after 19 March 2020 can also be re-employed and placed on furlough, but this only applies where the employee was employed on 19 March 2020 and was on the employer's PAYE payroll on or before 19 March (an RTI submission must have been made by that date).

Employers can also re-employ and furlough employees who have resigned (within the parameters set out above), though employers are not under a legal obligation to do so.

Can furloughed employees work for a different employer once on furlough?

If contractually allowed, employees are permitted to work for another employer whilst they have been placed on furlough (although they cannot carry out any work for the employer which has furloughed them). The updated guidance reminds any new employers that the starter checklist form should be completed correctly, and that if the employee is furloughed from another employment, they should complete Statement C.

Changes to terms and conditions

If an employee refuses to consent to a change to their terms and conditions of employment (for example a reduction in pay), are employers able to terminate their contract without furloughing them?

The answer to this question is not straightforward. If 20 or more employees are potentially affected then you might trigger collective consultation obligations. Also, employees with two or more years' continuous service will have protection against unfair dismissal protection meaning that you will need to have one of the statutory fair reasons for dismissal and you will need to follow due process (which, in a redundancy scenario, will involve the consideration of alternatives to redundancy and that is likely to include the possibility of furloughing at risk employees under the scheme).

Annual leave

Is there more clarity on the situation regarding annual leave for furloughed employees?

The guidance on the scheme has been updated to clarify (in part) the position on annual leave (the recently published Direction is silent on this point). In particular, it states that, while furloughed, employees will continue

to accrue leave as per their employment contract, and employees can also take annual leave whilst on furlough.

The guidance also makes reference to the Working Time Regulations which require holiday pay to be paid at the normal rate of pay or, where the rate of pay varies, calculated on the basis of the average pay received in the previous 52 working weeks. As such, any annual leave taken while on furlough must be "topped up" by the employer to 100% of normal pay.

Guidance on holiday entitlement (published on 13 May 2020) also explains the position for employers who are unable to fund the difference due to the impact of coronavirus on operations. For such employers, it is likely that this would make it not reasonably practicable for the worker to take their leave, enabling the worker to carry their annual leave forwards (as per new legislation explained below). In such circumstances, the worker must still be given the opportunity to take their annual leave, at the correct holiday pay, before the carried annual leave is lost at the end of the next two leave years.

Can employers force employees to take paid annual leave?

The guidance on holiday entitlement suggests that employers can require furloughed employees to take holiday while on furlough. The guidance states, however, that "the employer should consider whether any restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time, which is the fundamental purpose of holiday". Employers are required to give employees notice that is at least twice the length of the period of leave which they are being forced to take, and to engage with employees and explain the reasons for wanting them to take leave before requiring them to do so.

You should be aware that new regulations have been passed which allow up to four weeks of unused statutory leave to be carried into the next two leave years where it is "not reasonably practicable" for a worker to take some or all of the leave "as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society)". Therefore, there has been an amendment to the statutory prohibition on carrying over four weeks of statutory holiday.

The guidance on holiday entitlement provides some further detail on what is considered to be "reasonably practicable". In particular, it states that when considering whether it was not reasonably practicable in this context for a worker to take leave as a result of the coronavirus, an employer should consider various factors, such as:

- Whether the business has faced a significant increase in demand due to coronavirus that would reasonably require the worker to continue to be at work and cannot be met through alternative practical measures
- The extent to which the business' workforce is disrupted by the coronavirus and the practical options available to the business to provide temporary cover of essential activities
- The health of the worker and how soon they need to take a period of rest and relaxation
- The length of time remaining in the worker's leave year, to enable the worker to take holiday at a later date within the leave year
- The extent to which the worker taking leave would impact on wider society's response to, and recovery from, the coronavirus situation
- The ability of the remainder of the available workforce to provide cover for the worker going on leave

The guidance also advises that employers should do everything reasonably practicable to ensure that the worker is able to take as much of their leave as possible in the year to which it relates. Where leave is carried forward, it is best practice to provide workers the opportunity to take holiday at the earliest practicable opportunity.

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