SQUIRE PATTON BOGGS

Coronavirus Job Retention Scheme Update

Government Issues Further Guidance

Early on Saturday morning, following a fast and furious Twitter Q&A session with Chancellor Rishi Sunak on Friday (more on that later), HMRC issued some further guidance on the new Coronavirus Job Retention Scheme.

As set out in our previous two alerts on this topic, the Scheme will take retrospective effect from 1 March 2020 and will be available until 1 June 2020 at the earliest. The Chancellor has promised to extend it if necessary. Employers would be unwise to assume that it will definitely be extended, as the cost to the Treasury is obviously eye-watering and "necessary" is always a potentially elastic concept.

Perhaps entirely understandably, given the backdrop to this Scheme and the urgency of its announcement, the information provided by the government on this Scheme to date has been iterative in nature and open to interpretation, and has raised almost as many questions as it has answered.

To recap, there are two sets of guidance: one aimed at employers and the other at employees. As you would expect, they say broadly the same things, but in parts they deal with different issues to reflect their intended audiences.

The guidance documents have been updated three times so far. The first draft guidance, produced by the government following the announcement of the Scheme on 20 March, was little more than an outline framework. The updated guidance on 26 March went some way to answering the myriad of questions circulating, but also raised some new ones. Which brings us to the latest guidance, issued over the weekend. It certainly provides more clarity in some regards and also some new information, but again, it is regrettably silent on some key issues.

In terms of changes/clarifications in the latest guidance, the key points to note are:

It is confirmed that:

- Apprentices can be furloughed, but they must receive at least National Minimum Wage for all time spent training.
- Individuals can furlough employees, e.g. nannies, provided they were on a PAYE payroll prior to 28 February 2020.
- Foreign nationals can be furloughed if they were on a UK PAYE payroll at the end of February.
- Employees who are unable to work because they have caring responsibilities resulting from the coronavirus disease 2019 (COVID-19) can be furloughed, e.g. individuals with childcare responsibilities – seemingly irrespective of the financial position of the business or any other COVID-19-related impact.
- By contrast, the provision in relation to "shielding" employees has been amended to clarify that they may only be furloughed if they cannot work from home and would otherwise have to be made redundant.
- Employees made redundant or who otherwise ceased employment after 28 February 2020 can be (but have no right to be) re-hired by their previous employer so that they can take the benefit of the furlough scheme.

  In the face of public backlash during his Twitter Q&A on Friday, the Chancellor also confirmed that if employees stopped working for their employer after 28 February to go to a new role, which subsequently fell through for COVID-19 reasons, they could be re-hired by their previous employer and then furloughed; this has been reflected in the updated guidance.
- Further guidance is given regarding certain categories of individuals, e.g. employees on sick leave; on family friendly leave; on fixed-term contracts; office holders (including company directors); salaried members of Limited Liability Partnerships (LLPs); agency workers (including those employed by umbrella companies); and "limb (b)" workers paid via PAYE, all of whom now seem to be eligible.

The guidance is noticeably silent in a few key areas, however:

- The guidance does not provide a clear steer on how bad things have to be for an employer to qualify, or, indeed, on whether there is any such condition at all. The guidance states that the Scheme is for those employers that "cannot maintain [their] current workforce because… operations have been severely affected by COVID-19" and "is designed to help employers whose operations have been severely affected by COVID-19 to retain their employees and protect the UK economy". That sounds as if there is some requirement of damage by the virus. However, the next sentence says, "However, all employers are eligible to claim under the Scheme and the government recognises different businesses will face different impacts from coronavirus". This reference to different businesses facing different impacts is new.

  There had been speculation that any updated guidance would include clear thresholds for losses, as has been seen in similar schemes across Europe. However, this change rather seems to acknowledge a wide range of eligibility rather than restricting. The right is reserved within the guidance for HMRC to audit claims later (and note that the updated guidance confirms that the letters furloughing employees must be retained for five years, perhaps giving an indication of how far back HMRC might look), though it would seem unfair in the extreme to disqualify employers retrospectively from the support (i.e. require its repayment to HMRC) on the basis of some wholly unspecific and unannounced financial-health criterion.
- The guidance does not answer the question of whether holiday accrues during the furlough period. The closest it gets is the (unamended) part that states, "employees that have been furloughed have the same rights as they did previously. That includes Statutory Sick Pay entitlement, maternity rights, other parental rights, rights against unfair dismissal and to redundancy payments". We anticipate that this will be relied on to argue that holiday accrues during the furlough period also. Further, the Acas Guidance on Coronavirus: Advice for Employers and Employees makes clear that holiday will accrue. Although this is guidance, not binding, and there are arguments to the contrary based on prior case law, we think that denying that holiday accrues would not play out very well.

Given the various iterations of the Scheme, over the page is our updated Q&A on what is known about the Coronavirus Job Retention Scheme so far.

Q&A

What Is the Scheme?

Q: What is the new "Coronavirus Job Retention Scheme" and how will it work?

A: The Chancellor recognises that the government's "social distancing" measures and the restrictions imposed on business operations have constrained consumer demand and business income in many sectors, making it difficult or impossible for many businesses to continue to operate.

The Coronavirus Job Retention Scheme is intended to prevent the need for employees to be made redundant. Employers will be eligible for a direct government grant of up to 80% of the employment costs (up to a maximum of £2,500 per month) of any employee who would otherwise face being laid-off or made redundant as a result of the virus. To get that support, the employer must keep the employee on its payroll.

Who Is it For?

Q: Which businesses will be eligible to participate?

A: The government guidance dated 26 March confirmed that all UK employers with a UK PAYE payroll scheme in place on or before 28 February 2020, enrolled for PAYE online and have a UK bank account are eligible to participate in the Scheme, including:

- Businesses
- Charities
- Recruitment agencies (if the agency workers are paid through PAYE)
- Public authorities

There is no upper limit on the funding the government will make available and no limit to the number of employees for whom an employer will be eligible to seek a grant.

The latest guidance also confirms that individuals (i.e. not just limited companies or other corporate employers) can furlough employees, such as nannies, provided they pay them through PAYE and they were on their payroll on or before 28 February 2020.

In addition, where a company is under the management of an administrator, the administrator will be able to access the Job Retention Scheme. However, HMRC states that it would expect an administrator only to do so if there is a reasonable likelihood of retaining the jobs of the workers, most probably through a sale of the business as a going concern.

Q: Which individuals are covered?

A: The guidance issued on 26 March said that the Scheme would only be available to those paid through PAYE, whether full-time, part-time, on agency contracts, flexible or zero-hours contracts. It now seems clear that although the guidance refers to "employees", it will also cover workers (provided in each case that they are paid through PAYE), e.g. agency workers, casual and zero-hour workers, office holders (including company directors); salaried members of Limited Liability Partnerships; agency workers (including those employed by umbrella companies); and limb (b) workers. The latest guidance also confirms that apprentices can be furloughed and can continue to train while furloughed.

Q: What about new recruits?

A: The Scheme will only cover employees who were on the payroll on 28 February 2020. This has unfortunately inevitably led to some job offers for starts post the end of February being withdrawn and notices to dismiss swiftly served.

However, during his Twitter Q&A on Friday, the Chancellor also confirmed that if employees stopped working for their employer after 28 February to go to a new role, which subsequently fell through (presumably for COVID-19 reasons, though this is not made express), they could be re-hired by their previous employer and then furloughed immediately. This is reflected in the latest guidance. Of course, this relies on a certain amount of goodwill having been maintained with the previous employer, as there is no incentive for it to do this other than helping out an ex-employee who would otherwise be left high and dry.

Q: What about employees made redundant or put on unpaid leave since 28 February 2020?

A: One bit of good news is that it will cover employees made redundant since 28 February 2020 as a result of the virus, provided they are re-hired by their employer. This will deal with those individuals who were dismissed for that reason in the gap between the economic situation worsening and the announcement of the new Job Retention Scheme. There is no statement as yet (and it may not come) that the re-hire must be with unbroken continuity of employment or on the same terms as before.

The latest guidance also confirms that individuals put on unpaid leave after 28 February 2020 can also be furloughed.

Q: Can employees on family friendly leave be furloughed?

A: The guidance is not clear in this regard. The 26 March version seemed to suggest that employees on maternity leave cannot be furloughed, but that if an employer offers enhanced contractual maternity pay, this will be included as wage costs and can be recovered under the Scheme in the same way as other wage costs. Query then whether the employee has to be furloughed in order to recover the costs? However, the latest guidance simply reiterates that the normal rules for maternity and other forms of parental leave and pay apply, but that enhanced (earnings related) contractual pay can be recovered through the Scheme. The same goes for employees who are entitled to enhanced paternity, adoption or shared parental pay. As you would expect, the guidance aimed at employees makes it clear that pregnant employees who are due to start maternity leave may see their Statutory Maternity Pay reduced to reflect their lower earnings while on furlough leave.

Q: What about employees on sick leave?

A: Employees on sick leave or self-isolating will be eligible for Statutory Sick Pay. Employees can only be furloughed once they are no longer receiving Statutory Sick Pay.

Q: What about employees who are "shielding" in line with government guidelines?

A: The previous set of guidance simply stated that "shielding" individuals could be furloughed. Interestingly, the latest guidance adds to this that "shielding" individuals can only be furloughed "if they are unable to work from home and you would otherwise have to make them redundant". This leads to a potentially unjust situation, as there may be cases where, e.g. an employer's business has not been severely affected by COVID-19 and they have work for an individual to do (so no redundancy situation), but this work cannot be done from home. These individuals will not be eligible to be furloughed and so may end up being put on unpaid leave, despite the fact that they are simply following government guidance. This does not seem to be in the spirit of the Scheme. Contrast to those with childcare responsibilities (see below). We think this is likely to be a grammatical error and that it should actually have said that you can furlough shielding employees if they cannot work from home or would otherwise have been made redundant.

Q: What about employees who are unable to work because they now have children to look after following the nursery/school closures?

A: This issue was only picked up on in the latest guidance – employees who are unable to work because they have caring responsibilities resulting from COVID-19 can be furloughed. For example, employees who need to look after children can be furloughed. It is interesting that there does not seem to be any requirement that these individuals would otherwise have been made redundant or laid off – contrast to "shielding" individuals above. So it would appear that business could be booming, but provided that the childcare responsibilities arise out of COVID-19, furlough can be used. The rationale for this must be that if the employee has to be at home and not working because of childcare or some other caring responsibility, their job will be at risk one way or the other, and that is what the Scheme is designed to avoid.

Q: What about employees on fixed-term contracts?

A: The latest guidance has confirmed that employees on fixed-term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period without breaking the terms of the Scheme. Where a fixed-term employee's contract ends because it is not extended or renewed, the employer will no longer be able claim a grant for them.

How Much?

Q: How much can employers claim?

A: HMRC will reimburse 80% of furloughed workers' usual "wage" costs, up to a cap of £2,500 (gross) per worker per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer contributions on that wage.

The way to work out employees' wages depends on what type of contract they are on, and when they started work.

For full time and part time salaried employees, employers can claim (subject to the cap) for 80% of the employee's actual gross salary as of 28 February 2020. For employees whose pay varies (and again subject to the cap in each case):

If the employee has been employed for 12 months or more, you can claim the higher of:

- The same month's earnings in the previous year
- Average monthly earnings for the 2019-2020 tax year

If the employee has been employed for less than 12 months, employers can claim for 80% of their average monthly earnings since they started work.

If the employee only started in February 2020, employers should work out a pro-rata for their earnings so far, and claim for 80%.

Q: What should employers include in the calculation of "wages"?

A: The 26 March 2020 guidance made clear that fees, bonuses and commission would not be included in the furlough payment. However, HMRC has slightly modified that position in the amended guidance and confirmed that employers can claim for "any regular payments they are obliged to pay employees". This includes wages, past overtime, fees and "compulsory" (which presumably means contractual) commission payments. However, discretionary bonuses (including tips) and commission payments and non-cash payments should be excluded.

The previous guidance made no mention of benefits in kind or salary sacrifice, but this is addressed in the latest edition. HMRC has confirmed that the reference salary should not include the cost of non-monetary benefits provided to employees, including taxable Benefits in Kind. 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. In other words, unless agreement to the contrary is reached, you use the post-reduction salary figure. 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.

Normally, an employee cannot switch freely out of a salary sacrifice scheme unless there is a "life event". HMRC has confirmed that COVID-19 counts as a life event that could warrant changes to salary sacrifice arrangements, if the relevant employment contract is updated accordingly, so that the furloughed employee can maximise his cash position.

HMRC has also confirmed that both the Apprenticeship Levy and Student Loans should continue to be paid as usual. Grants from the Job Retention Scheme do not cover these.

Q: What if 80% of wages would take an employee below the National Minimum Wage/Apprentice Minimum Wage rate? Is an employer obliged to top up?

A: This was a question that gained much traction after the first guidance was issued. However, the 26 March 2020 version confirmed that employers will only be required to pay the lower of 80% of an employee's salary or £2,500, even if, based on their usual working hours, this would be below the employee's National Living Wage/National Minimum Wage.

In the latest guidance, however, HMRC has confirmed that time spent training is treated as working time for the purposes of the minimum wage calculations and must be paid at the appropriate minimum wage, taking into account the increase in rates from 1 April 2020. As such, employers will need to ensure that the furlough payment provides sufficient monies to cover these training hours. Where the furlough payment is less than the appropriate minimum wage entitlement for the training hours, the employer will need to pay additional wages to ensure that the appropriate minimum wage is paid for 100% of the training time.

How Will it Work in Practice?

Q: Are employers required to obtain the consent of employees to be "furloughed"?

A: The guidance says that to be eligible for the subsidy, employers should write to their employees confirming that they have been furloughed and keep a record of the communication. The latest guidance confirms that this record must be kept for five years. It also says that "Employers should discuss with their staff and make any changes to the employment contract by agreement." There is no suggestion that obtaining such consent is a prerequisite to the employer being able to claim under the Scheme.

In terms of seeking consent from employees to be furloughed and, if applicable, the consequent 20% reduction in salary, employers should be aware that normal contractual law principles apply and that clearly the safest approach, if time allows, would be to seek the express consent of the employees to the change in order to avoid potential breach of contact/unlawful deduction from wages/constructive dismissal claims.

If express consent is achievable, that would obviously deal with the situation and mitigate any risk. Employees are more likely to be amenable to this in the current circumstances, especially as the guidance for them expressly notes that a failure to agree to being furloughed may leave them "at risk of redundancy or termination of employment".

In light of the commercial and time pressures faced by many companies, however, a more tailored and expedient approach may be required – in particular, the collective consultation procedures referred to in the most recent guidance may place impossible strains on cash flow – and we would be happy to discuss this with you.

Q: How long will employees be furloughed for?

A: Furlough leave must be taken in minimum blocks of three weeks.

Q: Can employers rotate employees on and off furlough?

A: Some employers are considering rotating the employees who are placed on furlough leave, so they do not end up with one group of employees disgruntled because they have had to come into work and another group who do not have to come to work but are disgruntled by their reduced earnings. This issue had been unclear to date, but the latest guidance clarifies that employees can be furloughed multiple times, provided each separate instance is for a minimum period of three consecutive weeks. Obviously, employers need to ensure they do not discriminate when selecting employees to be furloughed. Employers should also make clear the basis on which individual employees are being furloughed and when they may be required to return to work/be taken off furlough.

Q: Can employees do any work while on furlough?

A: Employees covered by the Scheme will not be allowed to do any work for their employer while they are on furlough leave. The only exception is volunteer work or training, so long as this brings no direct economic benefit to the employer. Employees who have jobs with different employers (e.g. two or more part-time jobs) will be able to continue to work for one employer while being on furlough leave with another, or can be furloughed by both with the Scheme funding available for both roles independently.

The latest guidance also appears to go further towards suggesting that an employee who is furloughed is entitled to obtain a new job under which he/she receives a salary, and yet continue to receive the furlough grant. If contractually allowed, employees are permitted to work for another employer while on furlough.

Any employer taking on a new employee should ensure they complete the HMRC starter checklist form correctly. If the employee is furloughed from another employment at the time, they should complete Statement C, presumably to ensure that they are taxed correctly their aggregate earnings.

This Scheme will not cover employees who are working reduced hours or are on short-time working; it is only designed to cover employees who are not working at all for their employer.

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