



Employment Law Newsletter – Coronavirus update 20th April

No weekend would be complete without new guidance from HMRC on how the Coronavirus Job Retention Scheme (CJRS) will work. So, HMRC updated its guidance on Friday evening.

The online service you use to claim opened at 5.30am, 20th April 2020.

Following the chancellor's announcement on Friday, HMRC now says that this a temporary scheme in place for four months starting from 1st March 2020, but it may be extended if necessary. Employers can use this scheme at any time during this period.

This is the fifth version of the guidance. Businesses have struggled to reconcile apparent contradictions and fill in gaps so you will have been worried that you may be penalised for a justifiable difference in interpretation or an honest mistake. This latest version says that:

HMRC will check claims made through the scheme. 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.

While we suspected that this would be the case, it is comforting to read it.

However, it adds:

HMRC has put in place an online portal for employees and the public to report suspected fraud in the Coronavirus Job Retention Scheme.

On HMRC's guidance to employees, it says:

If you're concerned that your employer is abusing the scheme you should report them. This could include your employer claiming on your behalf and not paying you what you're entitled to, being asked to work whilst on furlough, or making a backdated claim that includes times when you were working.

This makes it vital for your employees to agree and understand what you will pay them under CJRS so that you avoid an unwelcome and unwarranted audit.

The link for employees to report fraud advises them not to try to find out more about the fraud or let anyone know they're making a report, so you cannot guarantee that they will speak to you first.

Can you claim if you receive public funds?

Although those who receive public funds can access CJRS, the Government has continued to define its expectations.

Where you receive public funding for staff costs, and that funding is continuing, it expects you to use that money to continue to pay staff in the usual fashion – and correspondingly not furlough them. This also applies to non-public sector employers who receive public funding for staff costs.

If you receive public funding specifically to provide services necessary to respond to COVID-19, you are not expected to furlough staff.

However, the Government acknowledges that CJRS may be appropriate for some staff members in businesses that are not primarily funded by the Government and where those people cannot be redeployed to assist with the coronavirus response.

Can you furlough someone who is sick and unable to work?

Yes, but you are not obliged to do so. You can pay the employee SSP or claim their wages through the furlough scheme. Not both.

The latest guidance repeats that short term illness/self-isolation should not be a consideration in deciding whether to furlough an employee. However, if you wish to furlough employees for business reasons and they are currently off sick, you may do so, as with other employees. You would need to classify that employee as furloughed, with their agreement, in the same way as with your other staff members and stop paying them SSP.

What about those who are being shielded?

As with those who are sick, it is your choice. You can furlough employees who are being shielded but it is up to you to decide whether to do so. You can claim back from both the Coronavirus Job Retention Scheme and the SSP rebate scheme for the same employee but not for the same period of time.

When an employee is on furlough, you can only reclaim expenditure through CJRS, and not the SSP rebate scheme. If a non-furloughed employee becomes ill, needs to self-isolate or be shielded, then you might qualify for the SSP rebate scheme, enabling you to claim up to two weeks of SSP per employee if you had fewer than 250 employees on 28th February 2020.

What about holiday pay?

The Government has found it difficult to decide what to do about holidays and holiday pay. Employers are concerned that when people return to work, they will need all hands on deck and will not want their workforce to be taking lengthy periods of annual leave. Employees will not want to take annual leave when the country is in lockdown as they cannot truly enjoy it.

While HMRC has been silent on this point Acas has been saying:

If you're a furloughed worker

Employees or workers who are temporarily sent home because there's no work ('furloughed workers'), can request and take their holiday in the usual way, if their employer agrees. This includes bank holidays.

Furloughed workers must get their usual pay in full, for any holiday they take.

The employers' guidance and the Treasury's direction to HMRC still do not deal with it but strangely, the employees' guidance does.

It tells employees:

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.

During this unprecedented time, we are keeping the policy on holiday pay during furlough under review.

So, where do you stand on holidays for furloughed staff?

The position is that furloughed employees can request leave and, if you authorise it, you must pay it at their normal, pre-furlough pay, even if that requires you to top up the grant that you claim through CJRS. However, you can refuse that request if you have a business reason to do so.

What if you want to insist on employees taking annual leave during furlough?

The guidance doesn't tell us whether you can require an employee to take annual leave during furlough by giving them the required notice (that is twice the number of days that you require them to take).

Until the position is clear, it is safer not to require employees to use their annual leave during furlough.

The need to pay employees their normal weekly pay during a period of annual leave may make this option unattractive, but do speak to us if you wish to explore this option.

How should you agree to furlough employees?

HMRC's guidance says:

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. A record of this communication must be kept for five years.

Do speak to us if you need help in obtaining or recording agreement.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

watershedhr.com

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