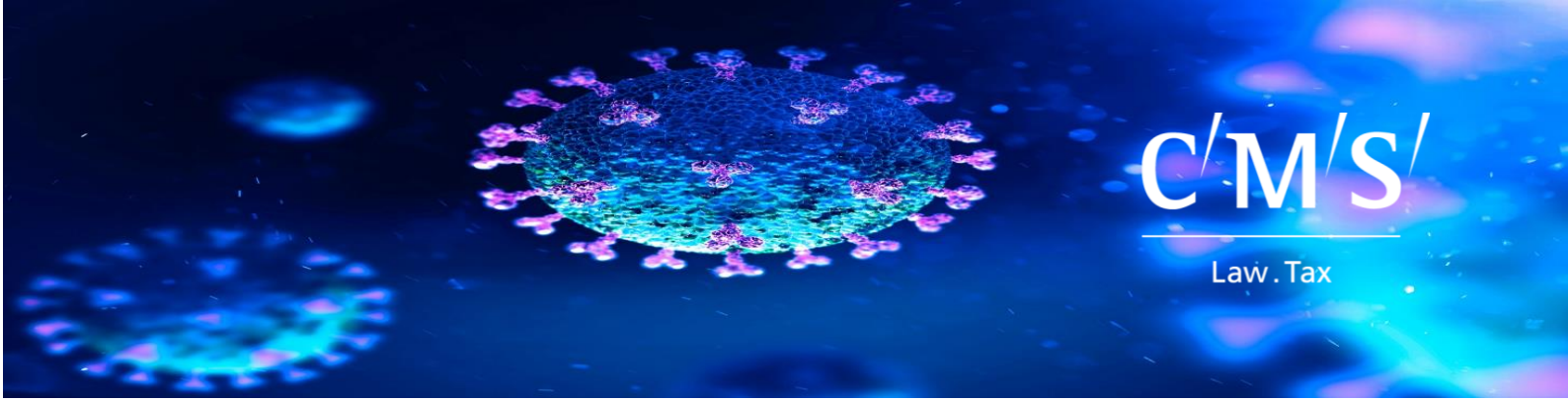

COVID-19 – Coronavirus Job Retention Scheme – guidance updated 9 and 15 April 2020 and new Treasury Direction

This note is current as at midday 16 April 2020

Introduction

Although the Government updated its guidance on the Coronovirus Job Retention Scheme (the "**Scheme**") as recently as 4 April 2020, it issued a third version on the evening of 9 April and a fourth version yesterday afternoon. It has also now published a Treasury Direction (made under sections 71 and 76 of the Coronavirus Act 2020) setting out the legal framework for the Scheme – which regrettably departs from the guidance in a number of respects.

9 April updates to guidance

The updates to the guidance made on 9 April:

— make clear that, whilst *"short term illnesses/self-isolation should not be a consideration in deciding whether to furlough an employee*", **employers are free to furlough employees who are absent due to illness or self-isolating** and in receipt of sick pay for business reasons, and such employees should receive furlough pay not sick pay (provided it is higher than statutory sick pay);

— clarify that **employers can furlough 'shielding' employees and those on long-term sick leave** if they choose;

— remove the requirements that employees who are 'shielding' (or need to stay at home with someone who is 'shielding') should be unable to work from home, and should otherwise have been made redundant, if they are to be furloughed;

— put beyond doubt that **employees with any category of work visa can be furloughed** and expressly confirm that *"grants under the scheme are not counted as 'access to public funds'"*;

— address the TUPE question, confirming that **employers of employees who TUPE transferred to them can access the Scheme** in respect of those employees if "*either the TUPE or PAYE business succession rules apply to the change in ownership"*; and

— introduce new provisions to allow the **employees of contractors with public sector engagements to fall within the scope of the Scheme** where those employees would be deemed employees under the IR35 regime.

15 April updates to guidance

The main update to the guidance made on 9 April is **the "key date" has now been changed from 28 February 2020 to 19 March 2020** (the day before the Government first announced the Scheme). So:

— employers can (only) claim for furloughed employees who were on their PAYE payroll and notified to HMRC on an RTI (real time information) submission on or before 19 March 2020 (previously 28 February 2020) – although employees who were on their employer's payroll and notified to HMRC on an RTI submission on or before 28 February and who were made redundant or otherwise stopped working after that date are still covered by the Scheme if their former employer agrees to re-employ them;

— new employers are eligible to claim under the Scheme for employees who TUPE transferred to them after 19 March 2020 (previously 28 February 2020); and

— claims in respect of employees whose pay does not vary should be for 80% of the employee's salary in "*their last pay period prior to 19 March 2020*" (previously "*of 28 February 2020*") – although employers who calculated their claims based on the employee's salary as at 28 February in light of the previous guidance can use this calculation (if it differs) for their first claim.

Some further details on the information the employer will need to collate and enter into the online portal (depending on whether or not there are fewer than 100 furloughed staff) have been added.

Treasury Direction

The key points to note from the 11-page Treasury Direction (the "**Direction**") are:

Purpose of the Scheme

— The purpose of the Scheme is stated to be "*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*", and claims which are contrary to this purpose or otherwise "*abusive*" may not be made (and presumably any payments made pursuant to such claims could be clawed back).

  The Scheme is not therefore limited to those employees who would otherwise be made redundant (even though the guidance continues to state that an employer can furlough employees where it "*cannot maintain [its] current workforce*"). It is arguable that it is limited to employment costs incurred because of the coronavirus emergency thereby excluding employees who the employer was planning to make redundant in any event – although that would seem contrary to the Government's apparent aim to protect as many workers as possible.

— The amounts payable to an employer pursuant to a claim are stated to be "*only made by way of reimbursement of the expenditure … incurred or to be incurred by the employer in respect of the employee to which the claim relates*". This (and a separate reference to amounts paid "*or reasonably expected to be paid*" by the employer to the employee) seems to confirm that employers can claim for deferred wage payments that have not yet been made to staff – although unhelpfully the Direction does include some contradictory wording.

— The payments made to an employer under the Scheme are *"made only for the purpose of CJRS"* and *"must be returned to HMRC immediately"* if the employer is unwilling or unable to use the payment for the purposes of the Scheme. This seems straightforward in the case of a solvent employer. However, in the case of a business in administration, it is not clear whether this is intended to 'red-circle' payments made under the Scheme and essentially override the provisions of the Insolvency Act 1986 in relation to the ranking of debts and distribution of assets in the period prior to the adoption of employment contracts by an administrator. The recent judgement in the *Carluccio* case (although decided before the publication of the Direction) suggests not.

Furloughed employees

— A furloughed employee is defined as an employee who has been instructed by their employer to cease all work for at least 21 days as a result of the coronavirus.

— However the Direction goes on to state that "*An employee has been instructed by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment*". This new requirement is potentially very significant, as it seems to mean that employers which simply instructed their employees to cease work without seeking their agreement (for example in reliance on a contractual lay off clause or because they intend to top up furlough pay to full pay) will not be able to claim under the Scheme, and employers which told their employees to go home because there was no work for them to do and then subsequently agreed with them that they would be furloughed will not be able to back-date their claims to the date the employees finished work. However, this seems completely contrary to the purpose of the Scheme, the principle that claims under the Scheme can be back-dated to 1 March and the guidance, which still states that claims should be started from the date that the employee "*finishes work and starts furlough, not from when the decision is made, or when they [were] written to confirming their furloughed status*" and that employers simply need to notify their employees in writing that they have been furloughed to be eligible to claim. It would be surprising if the Government really intends retrospectively to limit the scope of the Scheme in this way. Hopefully this is nothing more than overzealous drafting seeking to emphasise furloughed employees must cease all work, and we wait to see whether this point will be clarified.

— If an employee is in receipt of statutory sick pay ("**SSP**") when the employer's instruction to cease work is given then they cannot be furloughed until that SSP has ended (which could be up to 28 weeks later), but any subsequent period when the employee becomes unfit for work can be disregarded. This seems contrary to the guidance which, as mentioned above, says that whilst short-term illness should not be a reason for furloughing employees, employers are free to furlough those who are off sick and in receipt of SSP.

— A claim under the Scheme cannot be made in respect of an unpaid sabbatical or other period of unpaid leave which began before or after 19 March 2020. We would have thought "*other period of unpaid leave*" includes unpaid sick leave, unpaid holiday or unpaid maternity and other types of family leave. However, the guidance now expressly states that employers can choose to furlough employees on long-term sick leave, whose entitlement to sick pay may well have ceased.

— The work that a company director can do while furloughed is limited to work "*to fulfil a duty or other obligation arising by or under an Act of Parliament relating to the filing of company accounts or provision of other information relating to the administration of the director's company*". This is much narrower than many anticipated and means attending board meetings would break furlough. Training activities do not break furlough.

Qualifying costs

— "*Anything which is not regular salary or wages*" is not covered by the Scheme. "*Regular*" for these purposes is stated to mean any part of the employee's salary or wages which:

  - is not "*conditional on any matter*" or a benefit "*of any other kind*" (rather than "in kind") – it is entirely unclear what these exclusions are designed to cover; and
  - cannot vary according to performance (of the employer or the employee) or "*any similar considerations*" or be discretionary ("*such as a gratuity*") unless it "*arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions*".

  This is completely different to (and far more complex than) the wording used in the guidance, but is consistent with the principle established in the guidance that only regular payments which employers are contractually obliged to pay their employees are covered.

— For "fixed rate" (i.e. salaried) employees, the "reference salary" is the amount payable in the latest salary period ending on or before 19 March 2020. However, for fixed rate employees only, if this reference salary period includes a period when the employee was on unpaid sabbatical or unpaid leave, or was only in receipt of "social benefits" (such as SSP or statutory maternity pay), the reference salary *"must be determined on the basis of what would have been paid to the employee during the unpaid period if the sabbatical or leave had been granted on the same terms as the employee's paid leave".* It is not clear what is meant by "*paid leave*" in this context.

New employers

— The Direction expressly makes provision for new employers that had no qualifying PAYE scheme on or before 19 March 2020 (for example a NewCo established after 19 March 2020), as well as those who did, to be able to make a claim under the Scheme as though they were the original employer (provided the original employer would otherwise have qualified to make a claim). This applies where the relevant employees have been the subject of a business transfer (and *presumably*, although not expressly, a service provision change) under TUPE , their continuity of employment has been preserved under s218(2) of the Employment Rights Act 1996, or the PAYE business succession rules apply.

The Direction does not include much of the detail given in the guidance around things like how the Scheme applies for public sector organisations and administrators, which different types of employees and workers can be claimed for, the National Living/Minimum Wage rates payable if employees or apprentices are required to undertake training, the requirements to agree any necessary contractual changes with the affected staff and notify them in writing that they have been furloughed, and the more practical arrangements for making claims.

It is possible (although by no means certain) that amendments may be made to the Direction.

Holiday and furlough

Both the guidance and the Direction remain silent on the thorny issue of holiday entitlement during furlough. The latest ACAS guidance and tweets from HMRC over the Easter weekend appear to confirm that furloughed employees do continue to accrue holiday, and can take (and therefore also *presumably* be required to take) holiday during furlough without breaking the (minimum three week) furlough period, but must be paid in full for any holiday, including bank holidays, that they take. However, in further tweets on 15 April, HMRC has refused to confirm that an employer will be able recover 80% of a furloughed employee's holiday pay through the Scheme.

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