SQUIRE PATTON BOGGS

Coronavirus Job Retention Scheme Update – Government Issues Further Guidance

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Another weekend, another Twitter Q&A session with HM Treasury and another batch of amendments to the Coronavirus Job Retention Scheme guidance. We appreciate that HM Treasury is working around the clock and it is not that we are not grateful, but there does seem to be a pattern emerging in the timing of these releases…

As set out in our previous alert, 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. Please refer to that previous alert and the Q&A document set out at the end of this one for a general overview of the Scheme.

This marks the fourth iteration of the guidance documents, reflecting the nature of the Scheme as built on the hoof. We are yet to see any actual "law" in relation to this, nor even any reference to anything on the stocks. This may reflect recent and faintly unsettling suggestions that there will not actually be any black-and-white law at all on this beyond the powers granted to HMRC in the Explanatory Notes to s.76 of the Coronavirus Act to "deliver the scheme", and that this shifting-sands guidance is therefore going to be all we get. This would be pretty much unprecedented in UK employment law – while HR and employment practitioners are well used to operating within guidance, it is always through its helping interpret law found elsewhere, not constituting the law itself. The burden of precision and certainty on those producing actual law is much higher than upon those churning out mere guidance, and if legal rights and wrongs are to be founded on the guidance and nothing more, it is going to need to be substantially better than it is currently in those respects. The Scheme itself is undoubtedly an extremely worthy endeavour, but this law-by-social-media process perhaps reinforces the value of the extended consultation phase that new law usually goes through.

Given the urgency of getting the Scheme up and running, the guidance is being published without the luxury of time to think through all of the implications and/or how it might play nicely with existing employment law. As a result, each iteration has been met with a flood of new questions. The next edition then attempts to clarify some of those questions (though in the process, usually generating more), which brings us to the latest version.

Spoiler Alert – despite (cynics might say, as a result of) its being issued just before two bank holidays, this version of the guidance still does not deal with the various questions regarding holidays that are circulating. During Friday's Twitter Q&A, HM Treasury indicated that this was a "very fair question" (well, thank *you*) and that we could expect another update next week to cover that issue. However, although the list of information required to support an application has grown slightly, it still does not include any reference to whether any of those claimed for have been on holiday at any time over the relevant furlough period.

The guidance also does not deal with the issue we flagged last time, of how bad things need to be for the business as a result of the virus, if at all, for the employer to be eligible under the Scheme. That said, we understand that HMRC is looking closely at the issue of abuse of the Scheme and potential fraud and has announced that it is setting up an online "whistleblower" service for workers to use to report employers who abuse the system. It is much to be hoped that this channel will not just become an amplifier for the individual complaints of those furloughed against their will or who thought it should be someone else instead, or that their employer had money enough either not to furlough them at all or to top them up, but did not.

However, there are some amendments worth noting:

- As we anticipated, employees currently on sick leave **can** be furloughed for business reasons. The employee would no longer receive sick pay and would instead be classified as a furloughed employee. This also applies for those on long-term sick (if the employer chooses to do so), and the guidance makes clear that an employer can claim under both the Scheme for such employees and the statutory sick pay (SSP) rebate scheme, but not in respect of the same period.
- Employees who become sick whilst furloughed must receive at least SSP. It is up to employers to decide whether to move these employees onto SSP or keep them on furlough, at their furloughed rate. It is hard to see quite when an employer would do the former, given that in the great majority of cases, that will simply make the employee worse off and potentially at the employer's expense.
- If a furloughed employee who becomes sick is moved onto SSP (though again, why would you?), the employer can no longer claim for the furloughed salary. Employers are required to pay SSP themselves, although may qualify for a rebate for up to two weeks of SSP if it is Covid-19 related. If employers keep the sick furloughed employee on the furloughed rate, they remain eligible to claim for these costs through the Scheme.

- Shielding employees can be furloughed, without the need for them to be otherwise redundant (removing a strange provision from the previous draft of the guidance, as noted in our last alert).
- We finally have an answer on the TUPE question. Entirely predictably, the transferee employer is indeed eligible to claim under the Scheme in respect of the employees of a previous business transferred in after 28 February if either the TUPE or PAYE business succession rules apply to the change in ownership.
- Where a group of companies have multiple payrolls and there is a transfer of all employees in the group into a new consolidated payroll after 28 February, the employer will still be eligible to claim the grants available under the Scheme.
- The guidance around the Scheme has always made clear that employees cannot do any work for their own employer whilst furloughed, but it is now confirmed that employees also cannot provide services for or generate revenue for any linked or associated organisation.
- It is confirmed that an employer should only claim for employer's National Insurance (NI) contributions on the furlough pay, **not** the employee's full pay.
- **All** of the grant received to cover an employee's subsidised furlough pay must be paid to them in the form of money. No part of the grant should be netted off to pay for the provision of benefits or a salary sacrifice scheme.
- Where the employer provides benefits to furloughed employees, including through a salary sacrifice scheme, these benefits should be in addition to the wages that must be paid under the terms of the Scheme.
- Employers still need to pay employer NI and pension contributions (which can be claimed for) on behalf of furloughed employees. Employers cannot claim for additional NI or pension contributions made because they have chosen to top up the employee's salary or any pension contributions made that are above the mandatory employer contribution.
- It has helpfully been clarified that pay for employees "returning from" statutory leave (i.e. maternity leave, paternity leave, shared parental leave, adoption leave, sick leave and parental bereavement leave) will not be adversely impacted. In line with other employees, claims under the Scheme for employees whose period of statutory leave ends after 28 February should be calculated on their pre-leave salary, not the pay they received whilst on that leave.
- Claims for those on variable pay who are returning from statutory leave should be calculated using the higher of:
  - The same month's earnings from the previous year, or
  - Their average monthly earnings for the 2019-2020 tax year
- The list of requirements for employers to make a claim has been added to and now includes:
  - The employer's ePAYE employer PAYE reference number
  - The number of employees being furloughed
  - National Insurance Numbers for the employees to be furloughed (a new addition since last week)
  - Names of the employees to be furloughed (this is also new)
  - Payroll/works numbers for the employees to be furloughed (likewise)
  - The employer's Self Assessment Unique Taxpayer Reference or Corporation Tax Unique Taxpayer Reference or Company Registration Number
  - The claim period (start and end date)
  - Amount claimed (per the minimum length of furloughing of three consecutive weeks – but an employer can claim in respect of longer periods if the employer does not anticipate any changes in the number or identity of those being furloughed over that time)
  - The employer's bank account number and sort code
  - The employer's contact name
  - The employer's phone number
- It is confirmed that grants under the scheme are not counted as "access to public funds", which means employers can furlough lawfully working foreign national employees irrespective of visa type.

Given the various iterations of the Scheme guidance, here is our updated Q&A on what is known about the Scheme so far.

What Is the Scheme?

Q: What is the new 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 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, 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 guidance also confirms that individuals (i.e. not just limited companies or other corporate employers) can furlough employees, such as nannies, provided the individuals pay the employees through PAYE and were on their payroll on or before 28 February.

In addition, where a company is under the management of an administrator, the administrator will be able to access the 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 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. 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, it has been 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 guidance. Of course, this relies on a certain amount of goodwill having been maintained with the previous employer, as there is no incentive for the employer to do this other than helping out an ex-employee who would otherwise be left high and dry. We understand that many individuals, however, still feel that they slip through the net here, as circumstances do not allow/make it awkward, etc., for them to approach their previous employer.

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

A: One bit of good news is that the Scheme will cover employees made redundant since 28 February, 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 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 guidance also confirms that individuals put on unpaid leave after 28 February, 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 pay for those returning from family-friendly leave?

A: It has helpfully been clarified that pay for employees returning from statutory leave (i.e. maternity leave, paternity leave, shared parental leave, adoption leave, sick leave and parental bereavement leave) will not be adversely impacted. In line with other employees, claims under the Scheme for full- or part-time employees returning from statutory leave after 28 February, should be calculated against their pre-leave salary (subject to any interim increases), not the pay they received whilst on statutory leave.

Claims for those on variable pay returning from statutory leave should be calculated using the higher of:

- The same month's earnings from the previous year
- Their average monthly earnings for the 2019-2020 tax year

Q: What about employees on sick leave?

A: The latest guidance amends the previous position here. It is confirmed that the Scheme is not intended for short-term absences from work due to sickness (i.e. so should not be used to "top up" people for these absences), and employers are reminded there is a three-week minimum furlough period.

Short-term illness/self-isolation should not be a consideration in deciding whether to furlough an employee. If, however, employers want to furlough employees for business reasons and they are currently off sick, they are eligible to do so, as with other employees. In these cases, the employee should no longer receive sick pay and would be classified as a furloughed employee.

If a furloughed employee who becomes sick is moved onto SSP, employers can no longer claim for the furloughed salary. Employers are required to pay SSP themselves, although may qualify for a rebate for up to two weeks of SSP. If employers keep the sick furloughed employee on the furloughed rate, they remain eligible to claim for these costs through the Scheme. It is hard to see why an employer would insist on moving a sick employee off furlough onto SSP only.

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

A: The previous set of guidance stated that "shielding" individuals could only be furloughed "if they are unable to work from home and you would otherwise have to make them redundant". This led to a potentially unjust situation, as there could have been 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 could not be done from home. These individuals would not have been eligible to be furloughed.

The latest guidance confirms that employers are also entitled to furlough employees who are being shielded or off on long-term sick leave, without the need for them to be otherwise redundant. It is up to employers to decide whether to furlough these employees. Employers can claim back from both the Scheme and the SSP rebate scheme for the same employee, but not for the same period of time. When an employee is on furlough, employers can only reclaim expenditure through the Scheme, and not the SSP rebate scheme. If a non-furloughed employee becomes ill, needs to self-isolate or be shielded, the employer might qualify for the SSP rebate scheme, enabling it to claim up to two weeks of SSP per employee.

Q: What about employees who become sick whilst furloughed?

A: Furloughed employees retain their statutory rights, including their right to SSP, and so must be paid at least SSP if they fall ill whilst on furlough. It is up to employers to decide whether to move these employees onto SSP or to keep them on furlough at their furloughed rate.

If a furloughed employee who becomes sick is moved onto SSP, employers can no longer claim for the furloughed salary. Employers are required to pay SSP themselves, although may qualify for a rebate for up to two weeks of SSP where the illness is coronavirus-related. If employers keep the sick furloughed employee on the furloughed rate, they remain eligible to claim for these costs through the furloughed scheme.

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

A: 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. 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: 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 NI contributions and minimum automatic enrolment employer contributions on that wage.

The latest guidance confirms that an employer should only claim for employer's NI contributions on the furlough pay, not the employee's full pay.

It also confirms that 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. Grants for pension contributions can be claimed up to this cap provided the employer will pay the whole amount claimed to a pension scheme for the employee as an employer contribution.

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

For salaried employees, employers can claim (subject to the cap) for 80% of the employee's actual gross salary as of 28 February. 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, employers can claim the higher of:

- The same month's earnings in the previous year
- Their 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 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.

HMRC has also 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, including through a salary sacrifice scheme, this should be in addition to the wages that must be paid under the terms of the 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 their cash position.

The latest guidance confirms that **all** of the grant received to cover an employee's subsidised furlough pay must be paid to them in the form of money. No part of the grant should be netted off to pay for the provision of benefits or a salary sacrifice scheme.

HMRC has also confirmed that both the Apprenticeship Levy and Student Loans should continue to be paid as usual. Grants from the 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 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.

HMRC has also 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. 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 (essentially who, when and for how long) must be kept for five years. It also says, "Employers should discuss with their staff and make any changes to the employment contract by agreement." There is no suggestion that obtaining such consent expressly 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 still 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, going through 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: For how long will employees be furloughed?

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 **or any linked or associated organisation** (bold wording added in by the latest guidance) 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 guidance also appears to go further toward suggest 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 already furloughed from another employment at the time they join, they should complete Statement C, presumably to ensure that they are taxed correctly on 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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