

While businesses grapple with the wide-ranging and profound implications of the coronavirus disease 2019 (COVID-19), the retention and treatment of employees is high on the priority list. However, many will not be thinking about the potential impact that COVID-19-related measures (in particular, the Coronavirus Job Retention Scheme (CJRS)) could have on employee share schemes. Employee share schemes remain a versatile and valuable way to retain important employees but, as has become quickly apparent, no area is immune from the pandemic.

The Coronavirus Job Retention Scheme

The CJRS provides support to UK employers to enable them to continue paying up to 80% of certain employees' salary, up to a cap of £2,500 per employee per month. The scheme applies to those employees who have been "furloughed" as a result of COVID-19. The scheme is temporary, but the government has confirmed that it will initially last for at least three months from 1 March 2020.

Furloughed employees include those who are placed on a non-working leave of absence who, without the scheme, would have received no salary during the leave period. The scheme extends to any full-time or part-time employees, employees on agency contracts and employees on flexible or zero-hour contracts who were on a PAYE payroll with their employer on 28 February 2020. One of the main conditions to receive the CJRS grant is that while employees are furloughed, they cannot undertake any work for or on behalf of their employer. Employees who are working (albeit on reduced hours or for reduced pay) will not be eligible for the scheme and employers will need to continue to fund their salaries from their own resources.

The CJRS is discussed in more detail in our alert, [COVID-19: Coronavirus Job Retention Scheme: What Employers Need to Know](#) – UK (24 March 2020).

Enterprise Management Incentive Options – Working Time Requirement

Many small businesses will operate enterprise management incentive (EMI) share option schemes as a recruitment and retention tool for employees. EMI schemes are designed to offer a number of tax benefits for both employees and employers but there are, understandably, a number of strict criteria that must be met for these benefits to be available.

One of the main conditions for an employee to meet is the "commitment of working time" requirement. This requirement applies both at the time of grant of an option and throughout its life – failure to meet the condition (or ceasing to meet the condition) can, therefore, mean an option ceases to qualify for EMI tax benefits. The condition states that an employee must be required to spend at least 25 hours a week or, if less, 75% of their working time on the business of the relevant group.

There are concessions built into this requirement where an employee would have been able to commit that time to the business but for injury, ill health, disability, pregnancy or parental leave, a reasonable holiday entitlement or as a result of garden leave during a notice period (albeit scheme rules can often lapse an option in the latter case in any event).



It remains to be seen whether these concessions will be extended to cover employees who have been furloughed or who are required to work reduced hours and no longer meet the statutory test as a result. For those on reduced hours, it may be that the 75% of working time rule provides an adequate safety net.

We understand that concerns about this rule have been flagged to HM Revenue & Customs (HMRC). Given that ceasing to meet this requirement can lead to an immediate disqualifying event for an EMI option, we are hopeful that HMRC will confirm its view and approach soon.

Lapse of Share Options and Leaver Provisions

One of the most important, and potentially contentious, points that an employer has to decide when designing an employee share scheme is how they will deal with those employees who leave the business or are made redundant.

There are a number of ways that scheme rules tend to deal with this, ranging from (a) an automatic lapse of options, to (b) wide discretions being granted to boards and remuneration committees to decide on a case-by-case basis. Under the first alternative, there is a risk that the current health crisis could result in share options and awards lapsing inadvertently (e.g. where ceasing to perform employment duties while on furlough creates a lapse event). Under the second case, boards should have some scope to use discretion to prevent options from lapsing. However, even when this is the case, boards should always consider the circumstances carefully and demonstrably operate their discretion in line with the rules of the relevant scheme.

In some scenarios, scheme rules will specifically have catered for "redundancy" creating a "good leaver" event but will (understandably) not have envisaged such a thing as "furloughing". However, it should be remembered that the rules for tax-advantaged plans often apply in a way that will treat redundancy differently to other leaver events. Particular care will be needed when navigating the subtle differences in the operation of differing rules. Advice should be promptly sought on the implications for employees being furloughed or made redundant.

We Can Help

Employers should be careful when interpreting leaver provisions and should always consult the scheme rules carefully before making any decisions or communicating with employees. Where tax-advantaged share schemes are in place, it is important for employers to proceed with caution, following proper procedures, when exercising discretion or doing anything that could constitute an amendment to scheme rules or options already granted.

Failure to navigate both the scheme rules and tax rules carefully could lead to a loss of tax advantages.

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