SQUIRE PATTON BOGGS

UK Coronavirus Job Retention Scheme

Further Guidance on New Recruits and Re-hiring

24 April 2020

Another week, another version of the CJRS guidance! It is almost as though the CJRS portal were not already up and running, with the consequence that changes made now are effectively retrospective to claims already in the system.

Last night, the government issued v.7 of the employer guidance. This time the main changes are tweaks to the sections dealing with new recruits, ex-employees and fixed-term contracts. There is also some new wording dealing with the involvement of trade unions.

- **Employees you can claim for** – The employer guidance starts off by saying that employers can only claim for furloughed employees who were employed on 19 March 2020 and who were on the PAYE payroll on or before this date, i.e. a Real Time Information (RTI) submission notifying payment in respect of that employee had been made to HMRC on or before 19 March 2020. There is now also a table seeking to clarify those employees who are potentially covered by the scheme:

Was the employee employed with you as of this date?	Date RTI submission notifying payment was made to HMRC	Eligible for CJRS?
28 February 2020	On or before 28 February 2020	Yes
28 February 2020	On or before 19 March 2020	Yes
28 February 2020	On or after 20 March 2020	No
19 March 2020	On or before 19 March 2020	Yes
19 March 2020	On or after 20 March 2020	No
On or after 20 March 2020	On or after 20 March 2020	No

- In terms of new recruits, taking this at face value, it still seems to be the case that not all employees who started work in late February/early March will be eligible to be furloughed. For example, those employees who joined in late February/early March, but were not paid and a RTI submission made in respect of them by 19 March will still be disqualified. This is clearly designed to ensure that HMRC has some prior independent record of those people against which a furlough claim for them can be checked. However, in reality there is not the slightest legal or moral reason to disentitle people based on an accident of payroll date (as distinct from start date) so it is to be hoped that this relatively arbitrary gap is revisited soon. Otherwise, the much-vaunted extension of the Scheme into March will have been an empty promise for most monthly-paid hires in that month.
- Employees who left their "old" employer can be taken back on, put on furlough and a claim made in respect of them under the Scheme. That principle is not new (although there is further detail in the latest guidance about which employees are covered), but it does conflict with advice we have seen from HMRC – where an office closure had been decided pre-virus to take effect from the end of May, HMRC would not allow that to be delayed and a claim made for June, since neither the date of closure nor the reason for redundancies related to COVID-19. So that suggests that you can take people back on and furlough them regardless of whether they left for virus-related reasons, but you cannot keep them on and furlough them if they would otherwise have left on other grounds. As a result of this continued uncertainty around the relevance of reason for termination to eligibility under the CJRS, we reluctantly recommend not re-hiring those who left for non-virus reasons.
- There is some new wording in the employer guidance dealing with fixed-term contracts, following some confusion about whether employees on such contracts that expire mid-furlough can be re-employed and furloughed. The stated position to date has been that they can, though there are a number of separate reasons why this might not be a great idea for the employer – see below. It now says that an employee on a fixed-term contract can be re-employed, furloughed and claimed for but only if either:
  - Their contract expired after 28 February and an RTI payment submission for the employee was notified to HMRC on or before that date
  - Their contract expired after 19 March and an RTI payment submission for the employee was notified to HMRC on or before that date

Employees that started and ended the same contract between 28 February 2020 and 19 March 2020 will not qualify for the scheme. If the employee's fixed-term contract has not yet expired, it can be extended or renewed and employers can claim for these employees provided an RTI payment submission for the employee was notified to HMRC on or before 19 March. This does not mean that employers **must** extend fixed-term contracts. There may be good reasons why this is not appropriate.

Employers should, however, keep in mind that the non-renewal of a fixed-term contract will amount to a dismissal for unfair dismissal purposes, so if the employee has two years' or more continuous service, they should ensure they have a fair reason for not renewing the contract. Be aware, equally, that if the employee is eligible to be furloughed, this may be a factor that a tribunal will take into account, at least subconsciously, when deciding on the fairness or otherwise of a dismissal. Any renewal should be on terms allowing an early termination by the employer if conditions do not permit a long-term extension, so no need to renew or extend on more than statutory minimum notice.

- **Latest update on requirement for employee agreement** – It now seems clear that, despite what the Treasury Direction says, employers will not be prevented from making a claim to the Scheme simply because they have not obtained the written agreement of their employees to cease work during furlough. This was confirmed in an email made public yesterday from HMRC, in which it said that employers should comply with the employer guidance and that "*the employer and the employee must reach an agreement and an auditable written record of this agreement must be retained. It does not necessarily follow that the employee will have provided written confirmation that such an agreement was reached in all cases*." Probably the closest we will see to an acknowledgement that the Direction was in this particular respect wrong from the ground up, and much less embarrassing to the Treasury than having the Chancellor sign another one.
- Interestingly, v.7 of the guidance has been tweaked again on this point and it says (now largely superfluously) that collective agreements reached between an employer and a trade union will also be acceptable for the purposes of a claim, presumably reflecting the fact that many employers will have sought the agreement of the relevant unions in connection with furlough, rather than approaching individual employees directly.

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