

As you may know, the Treasury produced a [Direction](#) on Wednesday confirming the rules for HMRC to follow in its operation of the Coronavirus Job Retention Scheme (CJRS). The Direction follows four iterations of government guidance since the Scheme was announced. There is, however, one key difference between the Direction and all prior guidance: the Direction introduces a requirement to have a written agreement in place with employees confirming their agreement to cease any work for the business during the period of furlough. This is a new addition, and disconcerting in both its timing (days only before the CJRS portal goes live) and its nature, as it appears to relate only to the narrow point of ceasing work during the furlough period, and not to the actual fact or financial terms of the furlough.

The way it works, according to the Direction, is this:

- Paragraph 6.1 – For an employee to be furloughed, they must have been “instructed” by the employer to cease all work in relation to their employment. So far, so good.
- However, paragraph 6.7 then defines “instructed” for these purposes, but not in terms that reflect any normal understanding of the word. It says: “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.”

As above, this requirement was not included in any of the previous versions of government guidance (even in its most recent form as issued on the same day as the Direction). Previously, the only matter to be captured in writing was the confirmation from the employer that the employee had been furloughed, and while it might be thought implicit in that position that the employee would not work, there was no requirement that the employee had to agree expressly, let alone in writing, to that particular point. The almost universal view was the only sensible one, i.e. that the employee’s agreement to being furloughed and not working could usually be reasonably safely inferred from his/her not working and not resigning.

We find it hard to believe that the Direction is intended to mean what it says, given all of the guidance that has gone before, its last-minute timing and, above all, the essential pointlessness of this new requirement. Given how often things have changed in the last two to three weeks, it is difficult to predict the extent to which this requirement will be enforced. Logic, sense, necessity, crisis aversion, etc., all point to the Scheme operating in line with the guidance, not the Direction (although, technically, the Direction carries the weight from a legal perspective). If HMRC sticks rigidly to the approach as now set out in the Direction, we anticipate significant backlash from employers across the UK.

For the time being, however, the Direction says what it says, and unless and until amended, this part of it will undoubtedly create new and unwelcome uncertainty for employers in terms of both access to the Scheme when the HMRC portal opens next week, and a future audit trail perspective. So if you have not already obtained a written agreement, what is to be done about it?

Options

1. Wait for further guidance/clarity before making any claim under the Scheme. We expect that if there are to be changes, they should become apparent within the next two weeks or so.
2. Access the scheme portal next week to ascertain what, if anything, is required from the employer by way of confirmation on this point (i.e. any express assertion as to the existence of written agreements with employees about the cessation of work) and re-evaluate at that point. If the portal requires you to confirm that you have written agreements of this sort and you do not, you obviously should not make the claim until you do, so go to Option 3. If there is no such confirmation required as a condition of the claim then consider whether you feel comfortable to make the application in the meantime whilst you await any further developments in the construction of the Direction. There remains some risk with this option that you are making a claim without all of the agreements in writing, and we do not know whether HMRC will actually care about this provided that the agreements are obtained retrospectively in the very near future. Of course, there is the perennial risk that you may not get all the agreements back (even retrospectively).
3. Write to your furloughed employees to ask them to confirm their agreement not to work for you during furlough. The Direction does not appear to require the agreement in writing about the cessation of work to predate the period of furlough. Written agreement obtained now should, therefore, still be effective. Given the last-minute timing of the Direction, any other stance by HMRC would surely be adding insult to injury for employers.

Option 3 is potentially a colossal pain administratively, especially where you do not have email addresses for all your staff, but it is the option that currently provides the greatest security. Though employees will undoubtedly think it odd that you are asking now, it should also be uncontroversial from their perspective; it simply requires confirmation from them of what they have already been told – that they must not work for you during furlough.

If Option 3 is pursued, you would seem to need no more than a short written exchange with each furloughed employee, perhaps something like this, plus such additional pleasantries as you see fit:

Dear [],

The government has now updated its information relating to the furlough scheme and may now require us to obtain a written record of your agreement not to work for us during the furlough period before we can obtain the 80% salary payment for you. I am sorry about this last-minute obligation – we were not expecting it either. Could you please [insert means of communication/options regarding written confirmation: (a) sign and return the confirmation of agreement slip below; (b) email [] using the wording below; (c) text [] using the wording below]; or (d) use the voting buttons on this email].

Wording: *I agree that I will cease all work for my employer and any associated company during any period over which I am furloughed.*

Please sign off with your full name and employee number so we can keep a record of your agreement in your file and protect your 80% furlough payment. This does not affect any of your other rights or contract terms.

This is unfortunately urgent given that the scheme for claiming your salary payments [opens/opened] on 20 April 2020. Please, therefore, respond as soon as possible.

We appreciate that it is obviously deeply unhelpful and distracting to have to consider a further step in your furlough approach at this late stage, but it is unfortunately entirely reflective of the somewhat haphazard manner in which the CJRS has been developed and communicated. If you have any queries in relation to this note, please contact us.