

The Coronavirus Job Retention Scheme has gone live this morning and it seems that it was another busy Friday evening down at the HMRC, with a flurry of new and only slightly (but importantly) contradictory guidance issued by the government in anticipation of the Scheme's going live today.

Here's a short summary of the latest developments- just in time, using the phrase charitably, for employers submitting their first claim to the Scheme this week:

- **The Scheme is being extended until 30 June 2020:** This was all over the media on Friday evening, as the Chancellor [announced](#) that with the extension of the coronavirus disease 2019 (COVID-19) lockdown measures it was only right to extend the furlough scheme for another month. Of course this will also have been driven by reports that some employers were proposing to kick off collective redundancy consultation exercises this week (in order that they could be concluded by the end of May) if they did not receive assurances from the government that the Scheme would be extended.
- Yet another version of the **employer and employee guidance on the Scheme:** We are now on v.5, which must be some sort of record for the number of times a piece of government guidance can be updated in less than a month! **UPDATE:** This morning the government has in fact published a v.6 of the employer guidance, although no substantive changes seem to have been made. It has, however, moved some of the information about making a claim to a separate [guide](#).
- **Employer guidance:**
 - The most notable change here is the swift re-drafting of the section entitled "Agreeing to furlough employees". In our [Alert](#) last week, we flagged that the Treasury Direction (which sets out the legal framework for the Scheme) contained a wholly new and unexpected requirement on employers to obtain the written agreement of their employees to **cease any work** for the business during the period of furlough, in order to be eligible to make a claim under the Scheme. This new wording caused something of a stir as no such requirement had been set out in any of the three previous versions of the guidance, nor was it mentioned in the fourth edition even though it was published on the same day as the Direction

The new requirement was widely panned as an error, but left employers not knowing whether to assume it would be corrected and so ignore it, or take it as binding because, well, it was. The employer guidance now says (new words in bold), "*To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. **If this is done in a way that is consistent with employment law, that consent is valid for the purposes of claiming the CJRS. There needs to be a written record, but the employee does not have to provide a written response***". So no requirement for a written agreement of *anything* there, let alone to the distinct issue of not working during furlough. Good news for employers on the face of it, but against that, the Treasury Direction has not been changed. As that technically trumps the guidance, employers are in principle still left in an uncertain position if the written agreement required in it has not been obtained. Maybe by the time you receive this alert we will have seen some quick re-drafting of the Direction over the weekend – nothing yet though! What does appear clear, however, is that regardless of the position at law, employers will be at least morally entitled to rely on the subsequent guidance over the Direction and HMRC has lost any moral high ground it might ever have had in making that written consent a condition, now or subsequently, of the furlough support.

- Large chunks of the guidance have also been taken out and are now to be found in separate [online guidance](#) on how employers should work out 80% of their employees' wages and how much to claim for National Insurance contributions and pension contributions.
- The guidance also now includes an upfront reminder that HMRC will check claims made through the Scheme and that payments will be withheld or required to be repaid if the claim is based on dishonest or inaccurate information or found to be fraudulent. There is a hotline for employees and the public to contact in cases of suspected fraud.
- **Employee guidance:**
 - The main change is the inclusion of a new section on annual leave and holiday pay (at last!). Interestingly, however, there is no similar section in the employer guidance, which is a little strange to say the least. After all, it has been employers that have been crying out for more information on this very issue. Key points are:
 - Employees will continue to accrue leave during furlough, as per their employment contract.
 - Employees can take holiday whilst on furlough.

- Employees should be paid their normal rate of pay when on holiday and if their pay varies, it should be calculated on the basis of their average pay in the previous 52 working weeks, as per the holiday pay provisions in the Working Time Regulations 1998.
- For bank holidays, employers should either top up pay to 100% of usual pay, or allow employees to have time off in lieu.
- One thing neither set of guidance addresses is whether employers can *require* employees to take holiday during furlough. Presumably this is deliberate and therefore the safest approach for employers is likely to continue to be not to require employees to take annual leave during furlough. It may be thought that the payment of holiday over that time at full rate would be enough to tempt employees to take some of their accruing leave anyway, especially if the furlough salary is not otherwise topped up.
- And maybe this is not the last word on holiday pay anyway, as the guidance on this point concludes faintly sinisterly that “*during this unprecedented time, we are keeping the policy on holiday pay during furlough under review*”, indicating a possible change in approach if the lockdown period continues (though it is very hard to see how that could be retroactive in effect).

- **A step-by-step [guide](#) for employers on how to make claims through the Scheme:**

This guide deals with the steps that employers should follow when they submit a claim via the online portal. To prevent its switchboard going up in flames in the first 10 minutes, the clear message from HMRC is “please do not contact us if you have any queries”! Apparently the system has been designed to be simple to use – do let us know whether you agree! Employers should be aware that they cannot make more than one claim during a claim period, that they should make their claim shortly before or during payroll and that they must claim for all employees in each period at one time as they cannot make changes to the claim. The scheme will open today (20 April) and employers should receive payment six working days after their application.

If you have any queries concerning the Job Retention Scheme or in connection with making a claim to the Scheme, do not hesitate to get in touch with your usual Labour & Employment contact.