SQUIRE PATTON BOGGS

COVID-19: UK Chancellor Issues Second Treasury Direction on Coronavirus Job Retention Scheme

EMEA- UK

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There have been two key developments on the Covid-19-related employment law front over the last few days.

1 A New Treasury Direction on the Coronavirus Job Retention Scheme

On Friday 22 May, the Chancellor issued an updated Treasury Direction ("TD2"). You may recall that this is officially "the law" relating to the Coronavirus Job Retention Scheme.

In theory, you would like to think, the separate HMRC guidance for employers and employees on the Scheme should reflect what is contained in the Direction, although to date there have been some inconsistencies between the two. Indeed, this appears to be part of the reason for the re-draft (or at least an opportunity to pick up on some of these inconsistencies), as a number of the changes seem to have been made to ensure that TD2 is in line with more recent versions of HMRC's guidance. The good news is that none of the changes appear to be hugely significant and the bad is that the drafting of the Direction is in parts hard to navigate and some points are regrettably (not to say unforgivably, after so many goes at it) still unclear.

Key points about TD2:

- It only deals with the extension of the Scheme until 30 June, so we can look forward to a v.3 at some stage dealing with the changes due to take effect from August onwards (including employers being required to contribute to the costs – more details on this should be available later this week) and its overall extension until October 2020.
- Any claims by employers made from 23 May (i.e. after publication of this Direction) must comply with this version, as opposed to Treasury Direction No.1. This appears to include claims after that date for employees in respect of whom earlier claims have already been made and accepted.
- **Employee agreement – the CJRS' unicorn**: You may remember that the original Treasury Direction issued on 15 April 2020 said that to be eligible to make a claim under the Scheme, employers needed the written agreement of their employees to cease all work during the furlough period. Published just a few days before the Scheme went live, this wording caused a bit of a stir, but its potential impact was mitigated to a large extent by some quick re-drafting of HMRC's guidance which, although not binding, accepted for practical purposes that written agreement was not a pre-requisite of a claim. Since then we have been waiting for a formal change to the Direction to reflect this and the good news is that the offending wording has now been removed. To say that the new wording is much clearer would, however, be an overstatement, and the opportunity has been taken to add a further equally meaningless condition to fill that void.

TD2 now says that an employee will only have been furloughed for the purposes of making a claim under the Scheme if the employer and employee have "*agreed*" that the employee will cease all work in relation to their employment. It is more than likely that it will be possible to infer that acceptance from the employee making no attempt to work, so no express written agreement is required so far. However, TD2 then goes on to say that that agreement (including any collective agreement) must:

- Specify the "*main terms and conditions upon which the employee will cease all work*" in relation to their employment;
- Be incorporated (expressly or impliedly) in the employee's contract;
- Be made in writing or confirmed in writing by the employer – email would be valid for these purposes; and
- Be retained by the employer until at least 30 June 2025.

If we compare this wording to the current employer guidance, the two still do not sit that neatly together. The employer guidance says, "*To be eligible for the grant employers must* ***confirm in writing*** *[our emphasis] 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 through the scheme. Collective agreement reached between an employer and a trade union is also acceptable for the purpose of such a claim. There needs to be a written record, but the employee does not have to provide a written response.*"

So where does this leave employers? It seems that the safest but simultaneously least practicable approach will continue to be to obtain the employee's express written agreement to being furloughed. However, if this has not been obtained then as a minimum the employee must have "agreed" to being furloughed – as above, presumably this can be inferred from the fact of their not attempting to do any work and not objecting to any part of the instructions provided to them on that score. But what are the "main terms and conditions upon which the employee will cease all work" which they must now be given? This surely cannot be intended to require a reiteration of all the terms and conditions of their employment remaining applicable to them while they are on furlough – confidentiality, non-competition, compliance with reasonable management instructions, etc., or a re-issued statement/contract under section 1 ERA. If it meant either of those it would surely just have said so, and then it would still have been meaningless but would at least have been clear. The only term and condition "*upon which they will cease all work*" is that they will cease all work, so once employers have said that, which they should have done already, what else is this new requirement supposed to cover?

It would be tempting to dismiss this new phrase out of hand as just another instance of the shoddy and disconnected drafting which has plagued the guidance and the first Direction, but remember that the new rules apply to employees already furloughed pre-23 May, who will be the vast majority of those ultimately benefitting from the Scheme. So if this does mean something additional to TD1, it is key for employers to know what it is if they are not to face the retrospective loss of large parts of their Scheme support from that date onwards. In the end, it remains our view at present that the government's prime concern is not to pay people who are working for the employer at the same time, i.e. not to subsidise employee wage costs. If the employer can show that it told them not to work and there is no evidence that they did work, that should be enough. Anything more formal or technical would be a triumph of form over substance, especially at this late stage in the game, and not something remotely helpful to the government's intended legacy from the Scheme.

- **Employees on sick leave**: TD1 said that employees who were eligible for Statutory Sick Pay (SSP) could only be furloughed once their original period of sick leave had come to an end, *regardless* of whether SSP was actually claimed or not. This was at odds with HMRC's guidance and caused particular confusion in relation to employees who were "shielding" in line with government guidance, as it seemed to suggest that such employees could not be furloughed until their "shielding" period came to an end. TD2 now says that where SSP is being paid or is due to be paid, the furlough period cannot begin until immediately after the end of the period of incapacity for work for which SSP is paid or due to be paid, provided that the timing of the end of the period of sickness has been agreed with the employee. This appears to be an attempt to clear up the confusion, but the wording is still not totally clear.
- **Employees on unpaid leave, e.g. unpaid sabbatical or other leave**: As per HMRC's guidance, it seems that for periods of unpaid leave that began before 1 March, furlough cannot commence until expiry of the relevant period of unpaid leave. If an employee went on unpaid leave between 1 March and 30 June, TD2 says that no claim can be made under the Scheme in respect of that period and an employee cannot be placed on furlough during the period of unpaid leave. At first blush, this seems at odds with HMRC's employer guidance, which continues to say that "*if an employee started unpaid leave after 28 February 2020, you can put them on furlough instead*". Presumably, therefore, this new wording in TD2 simply means that you cannot make a claim under the Scheme in respect of such employees if they remain on unpaid leave, but there is nothing to stop you bringing the unpaid leave to an end and putting them on furlough.
- **Directors**: As well as allowing directors to carry out certain statutory duties during any period of furlough (as per the original Treasury Direction), TD2 says they are also allowed during this time to make claims under the Scheme in respect of any of their employees and make payments of salary or wages to their employees.
- **Study or training**: TD2 confirms that employees can study or carry out training while on furlough without breaching the "no work" requirement, provided the purpose of this is to improve their effectiveness in the employer's business or the performance of it and it does not constitute providing a service to the business, generating any income or profit for it or contributing significantly to the production of goods or services for sale.
- **Pension trustees**: Furloughed employees can still act as occupational pension scheme trustees, provided that the conditions in TD2 are satisfied – this bit is new.
- **Wages or salary**: Tweaks have been made to what constitutes regular wages or salary and how such sums should be calculated for employees who have taken periods of unpaid leave, etc. TD2 says that "*regular*" salary or wages means pay "*that cannot vary according to a relevant matter except where the variation in the amount arises from a non-discretionary payment*" and arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions. A relevant matter for these purposes includes business performance, the employee's contribution, the employee's performance of his or her duties, etc. A variation "*arising from a non-discretionary payment*" would cover payments such as overtime, fees, commission, piece rates, etc.
- **TUPE transfers**: Transferees can potentially make a claim under the Scheme in respect of employees who have transferred to them if the TUPE provisions apply to the change in ownership. The relevant date for TUPE transfers has been changed from 19 March to 28 February in line with recent changes to HMRC's guidance. There is also some new wording allowing transferors to potentially make claims under the Scheme even where employees have not been furloughed for at least 21 days where this is because of a TUPE transfer, and some new provisions dealing with insolvency situations.

2 Non-essential Retailers Get Green Light for Reopening in June

In other news, on Monday night the Prime Minister set out a timeline for non-essential retailers in England to start reopening in June.

Outdoor markets and car showrooms will be able to reopen first (from 1 June), provided they can satisfy the "Covid-19 secure" workplace guidelines to protect shoppers and workers. These are the guidelines issued last week setting out employers' health and safety obligations in connection with staff returning to workplaces. The guidance for shops and branches has already been updated to reflect the best practice demonstrated by those retailers that have been allowed to remain open during the pandemic.

All other non-essential retailers, e.g. shops selling clothes, books, furniture, etc., will be able to reopen from 15 June, provided they too can satisfy the Covid-19 secure workplace guidelines.

See our recent guide on key issues for employers to consider on returning to work.

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