SQUIRE PATTON BOGGS

Coronavirus Job Retention Scheme:

UK Chancellor Issues Further Treasury Direction – Mire Deepens

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On Friday, the Chancellor issued the third (and presumably final) Treasury Direction in relation to the Coronavirus Job Retention Scheme. This is "the law" that will govern the flexible furlough arrangements from 1 July 2020.

As with the two previous Treasury Directions, this document is horribly complicated to navigate – to the point where the less trusting parts of you begin to wonder if it represents a deliberate attempt to deter CJRS applications by making sure that whatever the employer claims, it is almost bound to be wrong. For example, paragraphs 14.5 and 14.6 read "*A CJRS claim must not be made if the CJRS claim period of the claim would include a day that is not a permitted CJRS day*", being a day which "*falls in a period that is (or will be) covered by a CJRS claim period ("relevant CJRS claim period") and does not fall in a period covered by a CJRS claim period that begins on a different day to the day on which the relevant CJRS claim period begins, or ends on a different day to the day on which the relevant CJRS claim period ends*". Got that? Anyone? The sole attraction of this degree of opacity in the drafting of the Direction is that HMRC's ability to show wilful non-compliance with the CJRS claim rules in any later audit or prosecution around this sort of thing will be more or less nil.

The good news, relatively-speaking, is that there are no huge surprises in TD3. Much of the content reflects what was stated in HMRC's recent updated guidance on the new flexible furlough arrangements. We would recommend that you refer to that as a starting point for understanding the new arrangements. It is certainly more accessible than this Direction.

We noted a new sentence in the Direction under the heading "Purpose of CJRS", which says that "*Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a CJRS claim are used by the employer to continue the employment of employees in respect of whom the CJRS claim is made …*". Is this intended now to curb the ability of employers to make employees redundant during furlough? Presumably not, as nowhere does it say this expressly, and it would also be the small matter of three months late to the party in that respect. Furthermore, no similar changes have been made to HMRC's updated guidance, which still says that employees can be made redundant while on furlough. If it means that you can only claim under the Scheme if you pay the sums on to your staff and/or that you can only do that while they are still employed, then it adds nothing to what we already know. So if it was not intended to change anything, why add this in now?

Key points for employers to be aware of are:

1. As per HMRC's recent updated guidance:
   a. Employers will have until 31 July to make any claims under the CJRS in respect of the period 1 March to 30 June. If, for example, you have employees who have been furloughed for three consecutive weeks from 22 June, you will have to make separate claims to cover the days in June and the days in July you want to claim for, even though the employees have been furloughed continuously. This may mean that your claim periods will differ from the pay periods you use. This is to reflect the stepping down of the CJRS contribution each month over the next four months. July to October are defined as "CJRS Calendar Months", which are just like normal calendar months but more confusing.
   b. From 1 July, a CJRS claim may be made in respect of a "flexibly-furloughed employee", for which TD3 contains a new and long-winded definition – essentially, someone who is working less than their usual hours.
   To be eligible to make a claim under the flexible furlough arrangements, an employer must:
      i. have already made a claim under the CJRS in respect of the relevant employee for a period ending on or before 30 June (with the exception of employees who are returning from family leave and armed forces reservist employees);
      ii. have instructed employees to do no work during the relevant claim period or not to work the full amount of their usual hours, and they must have complied with this instruction;
      iii. have given the instruction by reason of circumstances arising as a result of coronavirus or measures taken to prevent or limit its further transmission;
      iv. have an agreement in place with the employee (either in writing or confirmed in writing). Note, however, that TD3 says that the agreement must be made **before** the beginning of the period to which the claim relates (although it may be subsequently varied to reflect any change in terms and conditions). So if you want an employee to be flexibly furloughed from 1 July, ensure you agree this with them in writing (or confirm the agreement in writing) before the new arrangements kick in. By paragraph 13, that agreement must contain "*the main terms and conditions on which the employee will not work the full amount of the employee's usual hours in relation to their employment*". Ghastly English aside, on what terms and conditions does the employee **not** work, other than that he may not work? Evidence of that written confirmation must be kept until at least 30 June 2025.

c. From 1 July, claims cannot straddle calendar months and the minimum claim period must be seven or more consecutive days, except in limited circumstances, e.g. where you are claiming for the first few or last few "orphan" days in a month **and** you have already claimed for the period ending immediately before it. For no obvious good reason, this requirement to have claimed in respect of an immediately prior period does **not** apply where the claim period is a week or more. If there **is** a considered rationale behind it, it may be to limit not the amount claimed but just the sheer number of claims requiring to be processed by HMRC. This does not mean you have to furlough staff for a minimum period of one week. From 1 July, agreed flexible furlough agreements can last any amount of time, save that unless otherwise specified, the period that employers can claim for must be at least seven calendar days. Furthermore, employers will not be able to claim for more employees than the maximum number whom they claimed for under any previous claim, except where they have employees returning from family leave or armed forces reservist employees.

d. There are some fantastically complicated provisions governing how employers should calculate "usual hours" for the purposes of determining the amount of CJRS relief which can be sought. Not for TD3 the cop-out of just taking contracted hours or a simple 12 week average backwards from a set pre-pandemic date. Buried somewhere underneath them is a simple pro-rating, but depending on the form of contract, you get to usual hours via CP x [H/P], CP x [H/D], H x [CD/SP] – there may be others but they are drowned out by the racking sobs of the person trying to apply them to hundreds or thousands of employees for a claim period of what may be less than a week. If you have any concerns about how to calculate your claims under the CJRS, please speak to your usual contact in the Labour and Employment team or one of the following:

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