

On Friday, HMRC issued some further tweaks to its guidance on the Coronavirus Job Retention Scheme (CJRS). The key change for employers to be aware of is the new wording about making employees redundant during furlough and, in particular, the fact it now says employers can only claim “for a furloughed employee who is serving a statutory notice period”. Unfortunately, as so often appears to be the case with updates to the guidance, rather than making things clearer when it would have been so easy to do so, these changes only raise further questions.

Until this latest update, HMRC’s guidance had said very little about the interrelationship between redundancy and furlough, which in itself had led to questions about whether employers could make staff redundant during furlough. On the face of it, the answer was “yes”; especially as the *employee* guidance said: “Your employer can still make you redundant while you are on furlough or afterwards.” The guidance was silent on which costs employers could claim, in particular whether they could recover any notice pay costs under the scheme.

Further questions about the ability of employers to make staff redundant during furlough were raised following publication of Treasury Direction No.3, which said not very illuminatingly: “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 ...”; but did not say what that actually meant in terms of the treatment of notice pay. Remember- the Directions are the actual law here, not just some aspirational chat-show like the guidance, so if you were looking to put the position beyond argument, that would surely have been the place to do it. That clarity could have been provided in one sentence – the CJRS will apply to salary payments made to employees remaining employed during any period of notice of termination up to the statutory minimum notice periods set out in section 86 ERA 1996.

But it did not say that and what was written instead was so unclear as to warrant a written parliamentary question – “whether employers are prohibited from using grants from the CJRS for employees placed on redundancy notice periods; and whether those grants must be repaid by employers if used during this period?”. This led to a written answer by Financial Secretary to the Treasury Jesse Norman some days later, so by someone who had had at his disposal both the time and the knowledge to prepare a proper and considered answer. Instead what we got was this: “Employers may continue to claim under the Scheme for a furloughed employee who is serving [ready for this?] a statutory notice period subject to eligibility based on contract of employment”. Uh? The only way that the statutory minimum notice can be “subject to eligibility based on contract of employment” is of course where the contractual entitlement is longer (since it cannot be less), which suggests that what is actually covered here is the contractual notice period.

This latest version of the guidance brings answers to some of these questions. It makes it clear that employers **can** make employees redundant while they are on furlough. It also confirms that employers cannot recover statutory or enhanced redundancy payments under the scheme. In terms of notice pay, it says that “You can continue to claim for a furloughed employee who is serving a statutory notice period”. If this means what it says, which is unfortunately not a given where the CJRS guidance is concerned, the two obvious questions it leaves unanswered are (i) what happens if an employee’s contractual notice period entitlement is longer than their statutory notice period – does the employer have to bear all that cost?; and (ii) as above, what on earth was Mr Norman talking about? Then you get into the more detailed issues that might arise – is this about redundancy dismissal only or will different rules apply where someone is dismissed for other reasons? Is this also the rule when it is the employee who gives notice, reducing the statutory minimum period to just a week irrespective of their length of service?

Is this wording deliberate or is it simply another case of shoddy drafting? The specific reference to statutory notice would seem to suggest the former, but against that one must balance last week's reference in Parliament to its being subject to contractual entitlements and the absence from Mr Norman's reply to any repayment by employers being required. Given that, the lateness of the day for a change of such magnitude and the wholly unexpected and very significant costs which this would mean for employers just at the time when they can least afford them, we suspect it is just inept drafting. We gather that the HMRC helpline is indicating today that the CJRS does cover contractual notice periods too. However, the fact remains that as matters stand the new guidance says what it says about statutory notice periods and so pending the further clarification which will inevitably be required, employers should be aware of this new wording when making any claims under the scheme. It may well be worth holding off for a week or so if finances permit.

By way of reminder, the statutory minimum notice provisions in s.86 ERA provide that employees are entitled to at least one week's notice per year of service, up to a maximum of 12 weeks. Many contracts of employment offer more generous notice periods and it is in relation to these individuals that there is now uncertainty. The changes highlighted above will not present an issue where an employee's statutory notice entitlement matches their contractual notice entitlement.

If you are wondering what the position is with regard to payments in lieu of notice, employers do not have the ability to recover these under the CJRS and so this is something to bear in mind when deciding whether to require an employee to work out their notice period or not.

HMRC's guidance is now scattered across an increasing number of separate guides. The changes referred to above are contained in the [employer guidance](#) on which employees you can put on furlough and in the [employee guidance](#).

Coronavirus Job Retention Bonus

The other key development last week was the Chancellor's announcement of the Job Retention Bonus, as part of his "Plan for Jobs" to boost job creation in the UK.

At this stage, we have very few details on this new bonus – further details will apparently be released before the end of July. According to the [document](#) issued last week, the government will make a one-off payment of £1,000 to UK employers for every furloughed employee who remains continuously employed through to the end of January 2021. As highlighted by the Labour Party, this appears to be the case even if the employer never had any intention of not retaining that individual, though how one could ever seek to identify that intention retrospectively has not been clarified. Employees must earn above the Lower Earnings Limit (£520 per month) on average between the end of the CJRS and the end of January 2021. Payments will be made from February 2021. This will represent another area for the polishing of badges among employers who choose not to take the allowance (some major retailers have already indicated that they will not), though whether that is due to sense of civic duty or a hope that it will minimise the chances of HMRC audit will remain their little secret.

If you have any questions about this alert, please speak to your usual contact in the Labour & Employment team or one of the following:

Contacts



Caroline Noblet

Partner, London

T +44 20 7655 1473

E caroline.noblet@squirepb.com



David Whincup

Partner, London

T +44 20 7655 1132

E david.whincup@squirepb.com