

Employment Law Update

Treasury Direction on Furlough Scheme

Many employers have faced significant frustrations in getting to grips with the government's coronavirus job retention scheme (furlough scheme). Employers have had to rely on regularly-updated government guidance, often vague in its terms and often inconsistent with previous government guidance. As such employers have had to implement the scheme as best they can per guidance at that time while awaiting more definitive rules.

The treasury has now issue a direction to HMRC instructing HMRC how to operate the scheme.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879484/200414_CJRS_DIRECTION_-_33_FINAL_Signed.pdf

This can now be treated as fairly definitive guide to the rules of the scheme. The direction is long, complex, and in some areas still unclear, but we do have clarity on a number of points. Some of these points are important and some of these differ from what was set out in previous guidance. We have addressed some of the main issues in this note. This is our understanding of matters at this stage but should not be treated as a definitive statement of the law or as legal advice.

What is a furloughed employee?

Furloughed staff must have been on the business' books as at 19 March 2020 (not 28 February 2020 as previously stated).

A furloughed employee:

- ❑ Has been instructed to cease all work and the furlough must have lasted (or will last) for at least 21 days
- ❑ Has agreed in writing (which can be by email) to cease all work. Note this is an important change. All previous guidance referred to the employer having to notify the employee of the furlough and keep a record of that. Now it is stated that the employee's written agreement is required. If this has not been done already this should be actioned immediately.
- ❑ The cessation of work must be due to circumstances related to coronavirus. This presumably will include employees who cannot work as they are shielding, looking after vulnerable relatives or children, self-isolating, etc, and cannot work from home as well as the more obvious cases where there has been a downturn in work for staff to carry out. It is now clear that the furloughed employee need not have been at risk of redundancy/lay off due to the employer's business being affected by the pandemic. However, the cessation of work cannot be for reasons unrelated to the virus.
- ❑ The furloughed employee cannot work for a connected employer or otherwise indirectly work for the employer. It presumably remains the case that the employee can do voluntary work that provides no benefit for the employer, or indeed can take up work for a (non-connected) employer if that is permitted by the terms of the employment contract

What about company directors?

Company directors can be furloughed and though they cannot work they can carry out very limited statutory duties – they can “fulfil a duty or other obligation arising by or under an Act of Parliament relating to the filing of company accounts or provision of other information relating to the administration of the director's company” The Institute of Directors is seeking urgent clarification arguing that this would prevent directors undertaking basic tasks such as paying suppliers or administering the furlough of other employees.

Can furloughed employees agree to defer payment of furlough pay?

The previous guidance did not address the issue of whether a furloughed employee, who was due 80% of salary, could defer that payment (or some of it) until the HMRC payments were made to the employer. If that was necessary for the employer to survive, then one might expect a sympathetic view to be taken.

The direction does not expressly address this point but there is some support for it. The scheme covers expenditure incurred “or to be incurred” for furloughed staff (that suggests a claim can be made for payments not yet made to the employees but which are due to them as furlough pay; that gives some support to the idea of employees agreeing to defer payment for a period of time, but it would need to be paid to staff as soon as the HMRC payments came in). Government briefings about the scheme have also suggested that when the HMRC portal opens on Monday 20 April 2020, claims can be made for April payroll and would hopefully be paid to employers before the end of the month, so that payment can then be made to staff. This again supports the idea that an employer can claim for sums not yet paid to staff, and could support the validity of a deferral arrangement. This is our view but is not specifically addressed in the direction.

Can an employee on unpaid leave be furloughed?

The direction states that where an employee is on unpaid sabbatical/leave, they cannot be furloughed until that period has come to its intended end.

While it is not clear, we cannot imagine that this would apply to employees who had been placed on unpaid lay off for reasons related to the pandemic, and equally may not apply to unpaid leave introduced, for example, for those who were shielding.

The direction refers to employees “enjoying” unpaid leave/sabbatical and it seems likely that this is intended to be restricted to leave for non virus-related reasons.

What must an employer pay by way of furlough pay?

The employer must pay the employee £2500 per month, or at least 80% of “**reference salary**” if that is less than £2500 per month.

The calculation of reference salary based on the direction is disappointingly complex, and in our view is not clear. This is an important issue because employers require to pay at the correct rate – they will of course not want to claim more from HMRC than is actually due, but arguably if they pay less, they are not paying staff in terms of the furlough scheme and HMRC could decline to reimburse. It is to be hoped that HMRC will not take a hard line where employers have sought to correctly interpret the rules but have taken a different view from HMRC as to what “regular pay” is.

The calculation depends on whether or not the employee is a “fixed rate employee”

Fixed rate employee –

You are a fixed rate employee if you get an annual salary to work X hours (basic hours), that salary is paid in equal instalments, and you are not paid anything else for working those basic hours. This is limited therefore to salaried, not hourly paid, staff. In terms of whether you are a fixed rate employee, it appears to be irrelevant whether overtime is paid for any hours over and above those basic hours.

Reference salary for fixed rate employees is simply the amount payable to the employee in the last payroll before 19 March 2020, but excluding anything that is not “regular wages or salary”. It is unclear whether that means that any overtime payments should be included. Previous guidance did suggest that the calculation should include “regular payments you are obliged to pay” staff, including “past overtime” but where there is no obligation to give overtime hours, it is not clear whether that counts as a payment the employer is “obliged to pay”.

Non fixed rate employee –

For employees who do not meet the definition of a fixed rate employee, reference salary is the higher of:

- Average remuneration in tax year 19/20
- Actual payment in the same pay period last year

But you must only include “regular salary/wages”. Regular means:

1. A payment which is contractually due
2. Wages not benefits
3. The payment must be “not conditional on anything”
4. The payment cannot vary according to
 - a. Business performance
 - b. Employee’s contribution
 - c. Employee’s performance of duties
 - d. DiscretionUnless that variation arises from a legally enforceable agreement

This is a remarkably complex definition and careful thought must be given to the calculation of reference salary for all those who are not fixed rate employees.

Previous guidance suggested that discretionary bonus and commission would not be covered but that compulsory commission would be. The position on overtime is unclear – does it come back to whether that can be considered “regular”? Where an employee has no regular hours at all, this calculation makes perfect sense – to look at all payments made to the employee – but it is less clear where the employee has fixed hours and occasionally earns other payments such as overtime.

We would advise all employers to carefully consider the calculation of reference pay and ensure that this is being paid at the correct amounts. Expert advice should be taken.

The direction states that where an employer has paid at an incorrectly low level, but makes an additional payment before claiming from HMRC, that should be treated together as a single payment.

What about employees who are off sick?

The direction deals, rather confusingly, with the issue of sick leave and SSP: If SSP is “liable to be paid” at the point the furlough would start, whether or not SSP has actually been paid/claimed, then furlough cannot begin until “the original SSP has ended” – does that mean the employee must regain health/exhaust SSP entitlement before they can be furloughed? That is our view but it is not clear.

Maternity and similar leave

The direction confirms that any SMP (or similar statutory pay) cannot be included in a claim for furlough pay from HMRC. Previous guidance stated that any enhanced contractual pay paid by the employer could be claimed. But we are still unclear on whether the employee would be furloughed, and whether that means their maternity leave has ended (and could not restart if the furlough scheme was to end)

Do we finally have clarity on holiday pay/annual leave?

No. The direction does not mention these matters! What is clear is that further government guidance will be required and that will be perilously close to 20 April 2020 when employers will be looking to start making claims to the HMRC.

Watch this space....



Caroline Carr
**Partner &
Accredited
Specialist**

E: cac@bto.co.uk
T: 0141 225 5263



Laura Salmund
Partner

E: lis@bto.co.uk
T: 0141 225 5313



**Jacqueline
McCluskey**
**Partner
Accredited
Specialist**

E: jmcc@bto.co.uk
T: 0131 222 2936



Douglas Strang
Senior Associate

E: dst@bto.co.uk
T: 0141 225 5271